Supreme Court, U.S.
FILED
JUL 20 1994
OFFICE OF THE CLERK

No. 94 154

In The

Supreme Court of the United States

October Term, 1994

MEMBERS OF THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, CENTRAL VALLEY REGION, IN THEIR OFFICIAL CAPACITY, AND EAST BAY MUNICIPAL UTILITY DISTRICT, A CALIFORNIA MUNICIPAL UTILITY DISTRICT,

Petitioners,

v.

COMMITTEE TO SAVE THE MOKELUMNE RIVER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

DANIEL E. LUNGREN
Attorney General of the State of California

RODERICK E. WALSTON
Chief Assistant Attorney General

DOUGLAS B. NOBLE
Acting Assistant Attorney General

SARA J. DRAKE
Deputy Attorney General
Counsel of Record

1515 K Street, Suite 511
P.O. Box 944255
Sacramento, California 94244-2550
(916) 324-5375

Attorneys for Petitioners Members of California Regional Water Quality Control Board, Central Valley Region, in their official capacity

ROBERT C. HELWICK
Chief of Resources Law
East Bay Municipal Utility District

375 11th Street
Oakland, California 94607

EDWARD BERLIN
LEONARD A. MILLER
ANDREW L. LIPPS
SWIDLER & BERLIN, CHARTERED

3000 K Street, N.W., #300
Washington, D.C. 20007
(202) 424-7500

Attorneys for Petitioner East Bay Municipal Utility District

July 20, 1994

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

137 pp

QUESTION PRESENTED

The Clean Water Act states, "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b). The question presented is:

Whether Congress intended to impose liability under Section 301(a) of the Clean Water Act on a State Agency, and a municipal entity acting at the request of the State Agency, for taking regulatory action to control acid mine drainage from an abandoned mine.

PARTIES TO THE PROCEEDING

The names of all parties in the court below are set forth in the caption of the case.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED IN THE CASE 2

STATEMENT OF THE CASE 2

A. The Pollution Problem 3

B. Cooperative Efforts to Control the Pollution Problem 4

C. The Beneficial Effect of the Mine Run Dam 7

D. The District Court Litigation 8

E. The Ninth Circuit Decision 10

REASONS FOR GRANTING THE PETITION 10

Summary 10

I. The Intent of Congress to Improve and Preserve the Quality of the Nation's Waters and to Preserve the Primary Role of the States to Implement the Clean Water Act is Thwarted by the Ninth Circuit Decision 12

II. The Ninth Circuit Decision Has Had and Will Continue to Have a Chilling Effect on State Cleanup Actions 14

TABLE OF CONTENTS – Continued

Page

III. The Ninth Circuit Decision is Contrary to Federal Decisions Requiring Only Those Responsible for Adding Pollutants to Navigable Waters from the Outside World Through a Point Source to Obtain an NPDES Permit..... 17

A. The Ninth Circuit Decision Ignores the Fact that Causation is a Required Element for Liability Under the Clean Water Act 17

B. The Mere Existence of a Point Source Does Not Satisfy the Causation Requirement Necessary to Impose NPDES Permit Liability..... 19

C. Because the Regional Board and EBMUD Did Not Cause the Acid Mine Drainage, They Should Not Be Held Liable Under the Clean Water Act 20

IV. Imposing Liability on the Regional Board and EBMUD Under the Clean Water Act for Regulatory Actions Taken to Abate Pollution Thwarts CERCLA's Purposes as Well as Those of the Clean Water Act..... 22

A. The Congressional Intent That States Take Action to Abate Pollution Has Been Carried Forward from the Clean Water Act into CERCLA 22

B. Pre-CERCLA Regulatory Cleanup Actions Are Deemed to Have Been Performed Under the Same "Protective Umbrella" That Prevents States From Becoming Liable for CERCLA Cleanups..... 26

TABLE OF CONTENTS – Continued

Page

C. Imposing Liability on the Regional Board and EBMUD Pursuant to the Clean Water Act Undermines CERCLA 27

CONCLUSION 29

TABLE OF AUTHORITIES

Page

FEDERAL CASES

American Paper Institute, Inc. v. EPA, 890 F.2d 869 (7th Cir. 1989) 13

Appalachian Power Co. v. Train, 545 F.2d 1351 (4th Cir. 1976) 19, 20

Arkansas v. Oklahoma, 112 S.Ct. 1046 (1992) 10, 12

Berman v. Parker, 348 U.S. 26 (1954) 28

Boise Cascade Corp. v. EPA, 942 F.2d 1427 (9th Cir. 1991) 13

Friends of Sakonnet v. Dutra, 738 F. Supp. 623 (D.R.I. 1990) 21, 26

In re Paoli R.R. Yard PCB Litigation, 790 F. Supp. 94 (E.D. Pa.) *aff'd*, 980 F.2d 724 (3d Cir. 1992) 23

International Paper Co. v. Ouellette, et al., 479 U.S. 481 (1987) 12

Kennecott Copper v. EPA, 612 F.2d 1232 (10th Cir. 1979) 12

Lake Cumberland Trust, Inc. v. EPA, 954 F.2d 1218 (6th Cir. 1992) 13

Lincoln v. Republic Ecology Corp., 765 F. Supp. 633 (C.D. Cal. 1991) 15

National Wildlife Federation v. Consumers Power Co., 862 F.2d 580 (6th Cir. 1988) 19, 20

National Wildlife Federation v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982) 11, 17, 18, 19, 20, 26

Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) 25

TABLE OF AUTHORITIES – Continued

Page

State of Missouri ex rel. Ashcroft v. Department of the Army, 672 F.2d 1297 (8th Cir. 1982) 20

State of N.Y. v. Shore Realty Corp., 759 F.2d 1032 (1985) 22, 23, 25, 26

Stilloe v. Almy Bros., Inc., 782 F. Supp. 731 (N.D.N.Y. 1992) 23

United States v. Azrael, 765 F. Supp. 1239 (D.Md. 1991) 24, 26

United States v. Dart Industries, Inc., 847 F.2d 144 (4th Cir. 1988) 23

United States v. Earth Sciences, Inc., 599 F.2d 38 (10th Cir. 1979) 13, 25

United States ex rel. TVA v. Tennessee Water Quality Control Board, 717 F.2d 992 (6th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984) 20

United States v. Mottolo, 695 F. Supp. 615 (D.N.H. 1988) 26

United States v. Northeastern Pharmaceutical, 810 F.2d 726 (8th Cir. 1986) 26

United States v. Skipper, 781 F. Supp. 1106 (E.D.N.C. 1991) 22, 27

United States v. Stringfellow, 31 E.R.C. 1315 (C.D. Cal. 1990) 23

FEDERAL STATUTES AND REGULATIONS

28 U.S.C. § 1254(1) 1

33 U.S.C. §§ 1251-1387 2

33 U.S.C. § 1251(a) 12

TABLE OF AUTHORITIES – Continued

Page

33 U.S.C. § 1251(b) 12

33 U.S.C. § 1311(a) 25

33 U.S.C. § 1319 9

33 U.S.C. § 1321 22

33 U.S.C. § 1342 ..... 2, 9, 18, 25

33 U.S.C. § 1362(12) 18

33 U.S.C. § 1362(12)(A) 25

33 U.S.C. § 1362(14) 17

33 U.S.C. § 1365 8

42 U.S.C. §§ 9601-9675 6

42 U.S.C. § 9601(20)(D) 24, 25

42 U.S.C. § 9607(a) 25

42 U.S.C. § 9607(d)(2) 24, 25

40 C.F.R. § 122.2 20

STATE STATUTES

California Water Code

§ 13304(a) (Deering 1977 & Supp. 1993) 5

§ 13304(b) (Deering 1977 & Supp. 1993) 5

§ 13305 (Deering 1977 & Supp. 1993) 5, 27

§ 13305(e) (Deering 1977 & Supp. 1993) 5

§ 13305(e)(1) (Deering 1977 & Supp. 1993) 5

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

118 Cong. Rec. 33715 (1972) (statement of Sen. Bayh), *reprinted in* 1 Congressional Research Service, *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 93d Cong., 1st Sess., at 216 (Comm.Print 1973) 13

118 Cong. Rec. 10203 (1972) (statement of Rep. Madden), *reprinted in* 1 Congressional Research Service, *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 93d Cong., 1st Sess., at 216 (Comm.Print 1973) 14

California Stats. 1969, ch. 482, § 33, p. 1088 28

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, Members of the California Regional Water Quality Control Board, Central Valley Region ("Regional Board") and East Bay Municipal Utility District ("EBMUD"), respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals on interlocutory appeal is reported at 13 F.3d 305 and is reproduced in the Appendix at pages A1-A14. The opinion of the district court granting partial summary judgment as to liability in favor of respondent was not published; it is reproduced in the Appendix at pages A15-A60.

JURISDICTION

The decision of the Ninth Circuit affirming the district court decision was entered on December 29, 1993. The Ninth Circuit order denying the petition for rehearing and rejecting the suggestion for rehearing en banc was entered on April 21, 1994. App., p. A61. This Court has jurisdiction to grant certiorari to review this interlocutory appeal pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THE CASE

The relevant statutory and regulatory provisions are reproduced in the Appendix at pages A63-A87.

STATEMENT OF THE CASE

Petitioners are the members of the California state agency charged with administration of the Clean Water Act,[1] 33 U.S.C. §§ 1251-1387, and a municipal utility district organized under California law. After the owners of an abandoned mine failed to comply with Regional Board orders directing them to clean up the continuing pollution caused by the mine, the Board, acting in its regulatory capacity, took a series of actions to mitigate the impacts to navigable waters caused by the discharge of pollutants from the mine. Pursuant to its authority under state law to seek assistance from other public agencies, the Board requested EBMUD to cooperate with the Regional Board in those actions. This case presents an important question of first impression: Do these regulatory actions subject the Regional Board and EBMUD to liability under the Clean Water Act?

---

[1] The State of California, through its State Water Resources Control Board and nine regional boards, carries out the point source permitting program of Section 402, 33 U.S.C. § 1342, of the Clean Water Act, in lieu of a federally administered program, subject to certain oversight authority and enforcement powers by the United States Environmental Protection Agency ("EPA"). App., pp. A68-A70.

A. The Pollution Problem

Penn Mine is an abandoned copper and zinc mine which operated intermittently for approximately 100 years, ending in the 1950's.[2] The companies that mined the site left behind reactive mine tailings, waste rock and excavated ores. When these reactive materials are exposed to oxygen and water they oxidize, forming acid. This acid leaches heavy metals in the area of the reaction. Rainwater or other water flowing over the oxidized materials readily dissolves and carries the acid and metals as it flows. The result is what is referred to as acid mine drainage.

The formation of acid mine drainage is self-perpetuating: once it starts it will continue until all the reactive materials have oxidized. The overwhelming source of most of the acid mine drainage at Penn Mine is the waste rock piles. At least 50 percent of the reactive materials in these piles has oxidized, so that any water runoff touching these wastes will transport acid and metals.

The portion of the Penn Mine site at issue is drained by two intermittent creeks, Hinkley Run and Mine Run creeks. Runoff passing through and over the mine wastes results in an acid mine drainage discharge into these creeks which, prior to 1978, flowed directly into the waters of Lake Camanche and the Mokelumne River.

Penn Mine discharges of acid mine drainage into the creeks degraded aquatic life in the Mokelumne for

---

[2] Penn Mine is located in Calaveras County, California, adjacent to a portion of the Mokelumne River that is now Camanche Reservoir.

decades.[3] Over 30 years ago, State agencies knew that polluted water flowed down the creeks every time it rained more than one-half inch in 24 hours and that conditions likely to cause fishkills occurred in the Mokelumne River if the river levels were low.

For many years, the Regional Board tried unsuccessfully to regulate releases from Penn Mine to the creeks through permits, administrative enforcement orders and court actions. In 1975 the Regional Board directed the mine owner, New Penn Mines, Inc., to apply for an NPDES permit, but it did not comply with that direction or any other Regional Board requirements. New Penn Mines, Inc., remains the owner, but is now defunct with no known assets.

B. Cooperative Efforts to Control the Pollution Problem

Following fruitless efforts to have the owners remediate the abandoned mine site, in 1978, after notice and public hearing, the Regional Board adopted a resolution requesting EBMUD[4] to participate in a project to abate the polluted discharges from the abandoned mine site.

---

[3] Chronic, severe acid mine drainage pollution affects many abandoned mines in California. The most devastating problem is at Iron Mountain Mine. At least seven other mines in the Sacramento river system have sterilized or degraded streams caused by acid mine drainage.

[4] In the early 1960's EBMUD acquired through condemnation a small portion of the inactive mine site to facilitate development of the downstream Camanche Reservoir. The confluence of Hinkley Run and Mine Run creeks runs through the property acquired by EBMUD.

This action was taken pursuant to California Water Code section 13305, which authorizes the Regional Board to seek assistance from public agencies to abate pollution.[5] App., pp. A83-A86.

Acting pursuant to that regulatory authority, Petitioners[6] constructed diversion structures to prevent creek

---

[5] A regional board may order any person who "causes or permits any waste to be discharged . . . into the waters of the state" in violation of a waste discharge requirement or who "creates . . . a condition of pollution or nuisance," to clean up or abate the effects of the waste. Cal. Water Code, § 13304(a) (Deering 1977 & Supp. 1993), App., pp. A80-A81. In the event that the responsible party fails to do so, the regional board is authorized to perform such cleanup, abatement or remedial work, which in the regional board's judgment is required under the circumstances, and to seek cost recovery from the responsible party. Cal. Water Code, § 13304(b) (Deering 1977 & Supp. 1993). Where the condition of pollution or nuisance results from a nonoperating business or industrial location, a regional board may seek assistance from a city, county or other public agency to abate the condition. Cal. Water Code, § 13305(e) (Deering 1977 & Supp. 1993).

[6] The Regional Board was at all times acting pursuant to clear regulatory authority to abate pollution at abandoned sites. Cal. Water Code, § 13305 (Deering 1977 & Supp. 1993). EBMUD, a public agency, was at all times acting pursuant to the Regional Board's authority to seek assistance from public agencies to abate pollution at abandoned sites. Cal. Water Code, § 13305(e)(1) (Deering 1977 & Supp. 1993). For that reason, EBMUD should be treated, in the context of this case, the same as the Regional Board and other State agencies that are given specific statutory authority to clean up pollution. Because of its special statutorily-authorized role at Penn Mine, all arguments in this petition related to State regulatory actions apply equally to EBMUD. Any references that do not specifically include EBMUD should be construed to mean that EBMUD is covered by that argument.

water from entering the polluted site. They excavated new impoundments and reconstructed existing impoundments within the beds of Hinkley Run and Mine Run creeks. A dam, known as Mine Run Dam ("the Dam"), was constructed at the confluence of the creeks. Each of the two drainages of the creeks now contains a cascade of three impoundments that converge into Mine Run Dam Reservoir.[7] The undiverted natural flows of these creeks, now polluted by contact with the Penn Mine site, collect in the impoundments. From time to time, the impounded contaminated water is recirculated from Mine Run Dam Reservoir through a pump and pipe system back into the upper impoundments of Mine Run Creek. When the upper impoundments reach full capacity, the water flows back down to the lower impoundments. The objective is to improve storage and evaporation, thereby further reducing the need for planned releases. The storage of the polluted creek waters in the impoundments changes the timing and frequency of the flow of the waters to Camanche Reservoir and the Mokelumne River.

In 1986 the Regional Board and EBMUD filed a cost recovery action pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675, against New Penn Mines, Inc., seeking compensation for the monies they had expended building the structures to control the discharges from the company's property. Finding that the

---

[7] The record contains a schematic diagram, showing the location of the dam, reservoir, and upper impoundments. For the Court's convenience, the diagram is included in the Appendix at page A62.

actions taken by the Regional Board and EBMUD were consistent with the National Contingency Plan, the Federal District Court for the Eastern District of California entered an order on July 27, 1988, ordering New Penn Mines, Inc. to pay the State of California $200,206 and EBMUD $343,269.23, plus interest, for their response costs.[8] App., pp. A91-A96. However, because New Penn Mines, Inc. had no assets, the judgment was never satisfied.

Neither the Regional Board nor EBMUD has ever owned or operated the mine.

C. The Beneficial Effect of the Mine Run Dam

As a result of the joint effort by the Regional Board and EBMUD, the flow of acid mine drainage in the Mokelumne River and Camanche Reservoir from the Penn Mine site has been substantially reduced. Since the structures went into operation, there have been no recorded fishkills in the river or reservoir attributable to the contaminated flows of surface waters from Hinkley Run and Mine Run creeks.[9]

---

[8] This order is not part of the record below. Petitioners ask the Court to take judicial notice of the order. Fed. R. Evid. 201.

[9] The Executive Director of the Regional Board, in the course of State administrative proceedings related to Mine Run Dam Reservoir, emphasized just how important the Mine Run Dam has been in mitigating the effects of the acid mine drainage discharges to the reservoir and river:

> The evidence clearly shows that before this dam was constructed, the Fish and Game testimony before us said every two years there was at least a major fish

There was no release of polluted waters from Mine Run Dam for over six years, from May 1986 to February 1993. If the Dam had not been there, polluted creek water would have flowed directly to the river and reservoir during each rainy season. Because river levels were low due to the drought, there would have been fishkills.[10]

D. The District Court Litigation

In October 1991, the Committee to Save the Mokelumne River ("CSM") brought an action against the Regional Board and EBMUD under Section 505, the citizen suit provision of the Clean Water Act, 33 U.S.C. § 1365, arising out of the operation of the Dam and the other impoundments. App., pp. A72-A73. CSM contended that the actions of the Regional Board and EBMUD to control the discharges of acid mine drainage from Penn Mine property made them owners/operators of "point sources" and as such they must obtain a discharge permit pursuant to Section 402 of the Act, the

---

> kill. If we look back over the last weekend, the last four days, the weekend plus a couple of days, we have an inch-and-a-half rainfall in Sacramento. I suspect that they had similar to that, maybe a little less, in that area. If that rainfall would have occurred without that dam site, I personally guarantee we would have wiped out every living, breathing thing in that little thread of Mokelumne River that you see right down there now, until it got down sufficient distance into Camanche, before it became diluted.

[10] Releases occurred in February 1993, as a result of abnormally heavy rainfall during January and February, but no fishkills were reported.

National Pollutant Discharge Elimination System ("NPDES"), 33 U.S.C. § 1342. In addition to seeking a declaratory judgment, CSM also asked the court to impose equitable relief.

On March 3, 1993, the district court granted CSM's motion for partial summary judgment as to liability against the individual members of the Regional Board[11] and EBMUD, determining that they are required to obtain an NPDES permit.[12] The Ninth Circuit reviewed this decision on interlocutory appeal. While the interlocutory appeal was pending, on September 10, 1993, the district court granted CSM's request for an injunction prohibiting permitless discharges. Other than entering final judgment, there is nothing further for the district court to do.[13]

---

[11] The Complaint against the Regional Board was dismissed on Eleventh Amendment immunity grounds. A separate lawsuit was filed against the Regional Board members and consolidated with the pending action. For ease of reference, the Regional Board members will be referred to hereafter as the "Regional Board."

[12] If Petitioners are required to obtain an NPDES permit, they will have to meet the limitations contained in that permit, regardless of the costs required. If any discharges from the abandoned mine do not meet the permit requirements, the Regional Board and EBMUD they may be subject to civil penalties, as well as criminal penalties, in an amount of up to $25,000 per day. 33 U.S.C. § 1319. App., pp. A65-A67.

[13] On July 18, 1994, CSM submitted a form of judgment to the district court. Petitioners do not object to the form of judgment.

E. The Ninth Circuit Decision

On interlocutory appeal from the order granting partial summary judgment, the Ninth Circuit affirmed. It held that the Regional Board and EBMUD are liable under the Clean Water Act because the structures they built and operate have "collected and channeled" polluted surface runoff containing acid mine drainage into a pollution control structure that is then discharged into navigable waters. App., pp. A8-A9.

The Ninth Circuit also rejected Petitioners' claim that the Regional Board could not be held liable under the Clean Water Act for exercising its regulatory authority to take action to remediate existing discharges of pollution from an abandoned mine site. The court disposed of this contention in a single paragraph, noting only that, unlike CERCLA, the Clean Water Act contains no express exemptions for actions taken pursuant to regulatory authority. Absent any authority to exempt the Regional Board or EBMUD, reasoned the court, the district court did not err in finding them liable. App., p. A11.

REASONS FOR GRANTING THE PETITION

Summary

This is an issue of first impression and one of great importance to the States and public agencies acting at their request. Because of the importance and the novelty of the Ninth Circuit's decision, the Regional Board and EBMUD ask this Court to grant certiorari. *Arkansas v. Oklahoma*, 112 S. Ct. 1046, 1052 (1992). Because no legal

issues remain to be resolved by the courts below, the interlocutory nature of this petition should not prevent this court from granting certiorari.

The decision of the court of appeals misconstrues the scope of liability under the Clean Water Act for regulatory agencies and those public bodies that act in concert with them. The decision is without precedent and ignores the regulatory/commercial distinction that other circuit courts have consistently applied in determining the scope of CERCLA, another important environmental statute. The Ninth Circuit disregarded the obligation of the Regional Board, imposed under state law as well as the Clean Water Act, to take all reasonable actions to abate pollution that threatens surface waters, particularly where the polluter is unwilling or unable to take action itself. The decision will have a profound chilling effect upon the willingness of regulatory authorities and public agencies to step into the breach left by those who abandon sites that continue to pollute the Nation's waters.

The court of appeals compounded its error by disregarding the clear statutory mandate of the Clean Water Act that only those persons who have caused pollutants to be added to navigable waters from a point source are required to obtain an NPDES permit. The Ninth Circuit's decision conflicts with the decision of the District of Columbia Circuit in *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982).

I. The Intent of Congress to Improve and Preserve the Quality of the Nation's Waters and to Preserve the Primary Role of the States to Implement the Clean Water Act is Thwarted by the Ninth Circuit Decision

Because the Clean Water Act does not "speak directly to the issue" of what liability a State incurs when it acts to control the adverse impacts of pollution caused by another, "the Court must be guided by the goals and policies of the Act," *International Paper Co. v. Ouellette, et al.*, 479 U.S. 481, 493 (1987). "[T]he guiding star is the intent of Congress to improve and preserve the quality of the Nation's waters. All issues must be viewed in the light of that intent." *Kennecott Copper v. EPA*, 612 F.2d 1232, 1236 (10th Cir. 1979) (quoting with approval *American Petroleum Inst. v. EPA*, 540 F.2d 1023, 1028 (10th Cir. 1976), *cert. denied*, 430 U.S. 922 (1977)).

This Court previously has recognized the important role Congress intended for States. "The Clean Water Act anticipates a partnership between the States and the Federal Government, animated by a shared objective: 'to restore and maintain the chemical, physical and biological integrity of the Nation's waters.' 33 USC § 1251(a)."[14] *Arkansas v. Oklahoma*, 112 S. Ct. at 1054. Congress mandated that States have the primary responsibility in the implementation of the Clean Water Act, including the prevention, reduction and elimination of pollution. "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C.

---

[14] 33 U.S.C. § 1251(a) appears in the Appendix at page A63.

§ 1251(b). App. A63-A64. Courts have consistently recognized the primary role to be played by States.[15]

Congress did not intend to require States to obtain permits under the Clean Water Act when they act pursuant to their regulatory authority to abate another's discharge of pollutants to navigable waters. In fact, Congress never contemplated that States would become liable under the Act as dischargers for such regulatory actions. The legislative history of the Clean Water Act makes it clear that Congress was concerned with controlling pollution caused by industry and other polluters.[16] The legislative history is replete with references to "industry" and "polluters."

> The whole thrust of the bill is to force industry to do the best job it can do to clean up the Nation's water, and to keep making progress, without incurring such massive costs that economic chaos would result.

118 Cong. Rec. 33715 (1972) (statement of Sen. Bayh), *reprinted in* 1 Congressional Research Service, *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 93d Cong., 1st Sess., at 216 (Comm.Print 1973) (hereinafter "Leg. Hist.").

---

[15] *Lake Cumberland Trust, Inc. v. EPA*, 954 F.2d 1218, 1220 (6th Cir. 1992); *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1429 (9th Cir. 1991); *American Paper Inst., Inc. v. EPA*, 890 F.2d 869, 873 (7th Cir. 1989).

[16] Caselaw underscores this Congressional concern. "The touchstone of the regulatory scheme is that *those needing to use the waters for waste distribution* must seek and obtain a permit to discharge that waste." *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979) (emphasis added).

> The emphatic provision of this legislation is that the Federal enforcement power will be enacted to prosecute violators of this legislation and compel complete compliance, without exception, to any [sic] pollutors, whether large or small.

118 Cong. Rec. 10203 (1972) (statement of Rep. Madden), *reprinted in* Leg. Hist. at 347. Petitioners have been unable to locate any reference in the legislative history of the Clean Water Act that would indicate that Congress ever considered, much less intended, that a State would become liable as a discharger for taking regulatory actions to abate the adverse impacts of discharges of pollution caused by another.

II. The Ninth Circuit Decision Has Had and Will Continue to Have a Chilling Effect on State Cleanup Actions

If the Ninth Circuit decision is allowed to stand and States become liable when they undertake remedial action to mitigate discharges to navigable waters of pollution caused by others, all States will, understandably, become reluctant to take any action to clean up polluted sites. The profound consequence of the Ninth Circuit's decision was recognized by Judge Fernandez in his concurring opinion.[17]

---

[17] At least one other court has noted the potential chilling effect on regulatory abatement activities from imposing liability on governmental agencies. "[I]f cities were held potentially liable under CERCLA each time they undertook to abate a public nuisance or engaged in a sovereign function which was, at best,

> Appellants earnestly argue that [holding the dam is a point source of pollution from the abandoned mine] will not serve the long-term purpose of bettering the aquatic environment. They indicate that it takes no genius or epopt to see what the message will be. Do nothing! Let someone else take on the responsibility. Let the water degrade, let the fish die, but protect your pocketbook from past and unnecessary expenditures. Do not try to bring some order out of environmental chaos. In short, appellants suggest that no Odysseus or Daedalus crafted the policy which we are now asked to follow. Perhaps they are correct; I suspect they are.

App., pp. A13-A14. The imposition of virtually unlimited State liability is inconsistent with the Congressional directive to restore polluted waters.

The district court's determination, now reinforced by the Ninth Circuit ruling, has had and will continue to have, a chilling effect on remediation efforts all across California, thereby frustrating the very progress toward restoration of the Nation's waters that underlies enactment of the Clean Water Act. Following the district court's decision, the Executive Director of the State Board advised the Regional Boards across California not to undertake cleanup activities at any site, whether abandoned or not, where there is a potential for discharge to surface waters. The concern, explicitly stated, is that where the Regional Boards so act, they may be held to

---

remotely related to the ultimate disposition of hazardous substances into the environment, they would become quite reluctant to fulfill their statutory mandates." *Lincoln v. Republic Ecology Corp.*, 765 F. Supp. 633, 638 (C.D. Cal. 1991).

"be responsible for meeting the terms of an NPDES permit at the cost of millions of dollars . . . [and] may also face assessment of civil penalties." App., p. A89. This result simply does not make sense and is directly counter to Congressional policy stated in the Clean Water Act.

The Penn Mine site is not unique. There are abandoned sites – not only mines – across California, indeed across the Nation, that continue to discharge pollutants into navigable waters even though commercial activity ended long ago.[18] If the decision below is allowed to stand, State agencies responsible for environmental regulation necessarily will confront an unenviable dilemma. If they choose to do nothing, they will forfeit their responsibility to help restore the Nation's waters for beneficial uses. If, instead, they choose to undertake remediation efforts which, as regulators, they would have preferred to impose on those who abandoned their responsibilities, they act at their peril, risking that they will be adjudged "dischargers," thereby shifting the enormous financial burden of site restoration to taxpayers.[19]

---

[18] Mines are unique, however, because complete elimination of acid mine drainage is difficult, if not impossible. This is due to the complexity in identifying sources and designing and implementing effective remediation actions. For example, after more than 10 years of effort by many parties, including EPA, efforts are still continuing in the effort to stop the flow of acid mine drainage from Iron Mountain Mine, located in Northern California.

[19] All costs of meeting the requirements of an NPDES permit issued to the Regional Board or its members will be borne by California taxpayers. Particularly in times such as these when the State of California is having difficulty meeting its other financial obligations, the Regional Board cannot agree to such an open commitment on abandoned sites.

III. The Ninth Circuit Decision is Contrary to Federal Decisions Requiring Only Those Responsible for Adding Pollutants to Navigable Waters from the Outside World Through a Point Source to Obtain an NPDES Permit

A. The Ninth Circuit Decision Ignores the Fact that Causation is a Required Element for Liability Under the Clean Water Act

The Ninth Circuit decision holding the Regional Board and EBMUD responsible for the discharge of acid mine drainage from an abandoned mine they neither own nor operate fails to recognize that the critical element of causation is missing. Although the issue of State regulator liability for discharges of another's pollution under the Clean Water Act is one of first impression, further support exists for the concept that Congress contemplated that only those responsible for causing the addition of pollutants to navigable waters are required to obtain an NPDES permit.

Five elements must be present before NPDES requirements apply to a particular discharge: "(1) a *pollutant* must be (2) *added* (3) *to navigable waters* (4) *from* (5) a *point source.*"[20] *National Wildlife Federation v. Gorsuch*, 693 F.2d at 165 (referencing the statutory definition of "discharge

---

[20] "Point Source" is defined in Section 502(14) of the Act, 33 U.S.C. § 1362(14) as:

> [a]ny discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, [or] conduit . . . from which pollutants are or may be discharged.

App., p. A72.

of a pollutant," 33 U.S.C. § 1362(12)). App., pp. A71-A72. EPA had determined that dams are to be regulated as nonpoint sources, *not* as point sources. At issue in *Gorsuch* was the propriety of that determination. The court noted that as a consequence of the impoundment of water, dams do induce water quality changes. *Gorsuch*, 693 F.2d at 163. Nevertheless, the court agreed that consequences of the impoundment, which unquestionably alter, in a negative way, the character of the ultimate discharge, do not constitute the "addition" of a pollutant by the dam and affirmed the EPA's conclusion that dams are not to be regulated as point sources pursuant to Section 402, 33 U.S.C. § 1342.

In reaching this decision, the *Gorsuch* court recognized that responsibility to obtain an NPDES permit includes the element of causation.

> The [Clean Water] Act does not define what constitutes the "addition" of a pollutant. The parties agree that water quality problems that occur within a reservoir (*e.g.*, dissolved minerals) are nonpoint pollution, for lack of a point source. The Wildlife Federation argues, however, that the statutorily necessary "addition . . . from a point source" occurs when (1) a dam causes pollutants to enter the reservoir and (2) the polluted water subsequently passes through the dam – the point source – into the formerly unpolluted river below. [fn.57]
>
> * * *
>
> [fn. 57] Both elements must be present. *Without causation, there is no legal responsibility for removing pollutants from the water.*

Gorsuch, 693 F.2d at 174, and n.57 (citing to *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1377 (4th Cir. 1976)) (emphasis added). The importance of causation is also reflected in court statements that an NPDES permit may be required only for a facility that "itself physically introduces a pollutant into water from the outside world." *Gorsuch*, 693 F.2d at 175; *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580, 585 (6th Cir. 1988).

B. The Mere Existence of a Point Source Does Not Satisfy the Causation Requirement Necessary to Impose NPDES Permit Liability

The Ninth Circuit attempts to distinguish this case from *Gorsuch* on the basis that Mine Run Dam Reservoir "collects or channels" surface runoff from the abandoned mine site. App., p. A8. The court correctly observes that acid mine drainage has been "collected" by the natural flow of surface runoff over Penn Mine property into Mine Run Dam Reservoir and the upper impoundments. However, the collection of surface runoff by natural drainage occurs at every dam. The collection of surface runoff, even if contaminated with pollutants, behind a dam impounding navigable waters[21] does not make dam operators liable for discharges from a point source once that runoff discharges from the dam. If that were so, the *Gorsuch* court would necessarily have concluded that the dam at issue required an NPDES permit. The *Gorsuch*

---

[21] Surface runoff is a normal component of navigable waters. In fact, intermittent creek flows (such as those of Hinkley Run and Mine Run creeks) are comprised substantially of surface runoff.

court took into account (and even quoted, see 693 F.2d at 175 n.58), the very regulations that define discharge of a pollutant and upon which the Ninth Circuit relied. 40 C.F.R. § 122.2. App., p. A8. The *Gorsuch* court nonetheless concluded that a dam that merely impounds polluted navigable waters does not require an NPDES permit to discharge those polluted navigable waters.[22]

C. Because the Regional Board and EBMUD Did Not Cause the Acid Mine Drainage, They Should Not Be Held Liable Under the Clean Water Act

Petitioners are not responsible for the discharge of pollutants to navigable waters – Penn Mine is. That condition long preceded Petitioners' appearance on the scene. By ignoring the true source of the discharge of pollutants – Penn Mine – and focusing, instead, upon the

---

[22] Courts have consistently applied the causation requirement. *See also National Wildlife Federation v. Consumers Power Co.*, 862 F.2d at 585 (holding that releases of dead fish and fish parts associated with a hydroelectric dam into Lake Michigan do not constitute the addition of any pollutant to navigable waters because the fish (albeit in live form) were in the waters prior to their impoundment by the dam); *United States ex rel. TVA v. Tennessee Water Quality Control Board*, 717 F.2d 992, 999 (6th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984) ("EPA has consistently treated dams as . . . not subject to discharge permit requirements of Section 402."); *Appalachian Power Co. v. Train*, 545 F.2d at 1377 ("Those constituents occurring naturally in the waterways or occurring as a result of other industrial discharges, do not constitute an addition of pollutants by a plant through which they pass"); *State of Missouri ex rel. Ashcroft v. Dep't of the Army*, 672 F.2d 1297, 1304 (8th Cir. 1982).

structures built by the Regional Board and EBMUD to control the discharge, the court of appeals committed the very error that the court in *Friends of Sakonnet v. Dutra*, 738 F. Supp. 623 (D.R.I. 1990), cautioned against:

> The words "point source" should not be separated from the words "addition of any pollutant," nor disassociated from what they are defining, "discharge of a pollutant." Dwelling on the words "point source" in isolation can lead to *absurd results that do not promote the purpose of the Clean Water Act.*

738 F. Supp. at 629 (emphasis added).

> "Point source" is in the definition of "discharge of a pollutant" to distinguish kinds of pollution, not to establish the source of liability. Liability must lie with the person or persons *causing the "addition of any pollutant to navigable waters."*

738 F. Supp. at 630 (emphasis added). Because Petitioners have not "caused" pollutants from Penn Mine to discharge from a point source into navigable waters, and because the Dam has not added pollutants from the outside world into navigable waters, Petitioners cannot be required to obtain an NPDES permit. When Mine Run Dam releases waters, pollutants flow into the Mokelumne River in the form of acid mine drainage, but that is only because those pollutants, coming from Penn Mine, are already in the waters impounded by the Dam.

IV. Imposing Liability on the Regional Board and EBMUD Under the Clean Water Act for Regulatory Actions Taken to Abate Pollution Thwarts CERCLA's Purposes as Well as Those of the Clean Water Act

The Ninth Circuit decision assigning liability under the Clean Water Act to a State agency for regulatory actions taken to abate pollution caused by another is a case of first impression. However, cases discussing governmental liability under CERCLA are instructive and show why, on the facts here, it was error to hold the Regional Board and EBMUD liable for discharges from Penn Mine.

A. The Congressional Intent That States Take Action to Abate Pollution Has Been Carried Forward from the Clean Water Act into CERCLA

There are many similarities between CERCLA and the Clean Water Act, and Congress chose to implement the CERCLA cleanup program by using the National Contingency Plan ("NCP") originally developed for Section 311 of the Clean Water Act, 33 U.S.C. § 1321. *United States v. Skipper*, 781 F. Supp. 1106, 1111-1112 (E.D.N.C. 1991). Further, CERCLA was enacted because the Clean Water Act and other federal acts were inadequate to assure the cleanup of hazardous pollution. *State of N.Y. v. Shore Realty Corp.*, 759 F.2d 1032, 1040 (2d Cir. 1985). As in the Clean Water Act, Congress contemplated a strong role for States in carrying out CERCLA's mandates. Congress intended that States use their own funds for cleanup, have more flexibility when acting on their own and

recover their cleanup costs from responsible parties *Id.* at 1042-1043, 1047. For these reasons, the CERCLA cases discussing the public policy considerations of holding a State liable for actions taken to clean up another's pollution provide useful guidance in construing the scope of the Clean Water Act.

Federal courts have generally refused to hold governmental authorities liable under CERCLA when they are acting in their regulatory capacity – particularly when the governmental entity has been acting to *clean up* hazardous wastes.[23]

> [R]eading Sections 120(a)(1) [42 U.S.C. § 9620(a)(1)] and 101(20)(D) [42 U.S.C. § 9601(20)(D)] as waivers of sovereign immunity for the EPA and states in carrying out their cleanup duties would contradict the statutory scheme of CERCLA and the policies underlying the statute. Allowing contribution counterclaims in this situation would undermine Congress' intent to ensure that those who benefit financially from a commercial activity should internalize the health and environmental costs of that activity into the costs of doing business. Further, it would conflict with the primary objective of CERCLA, which is to ensure prompt cleanups.

---

[23] Numerous courts have refused to impose CERCLA liability on governmental entities for cleanup actions taken in their regulatory capacity. *E.g., United States v. Dart Indus., Inc.*, 847 F.2d 144, 146 (4th Cir. 1988); *In re Paoli R.R. Yard PCB Litig.*, 790 F. Supp. 94, 96-97 (E.D. Pa.) *aff'd*, 980 F.2d 724 (3d Cir. 1992); *Stilloe v. Almy Bros., Inc.*, 782 F. Supp. 731, 736 (N.D.N.Y. 1992); *but see United States v. Stringfellow*, 31 E.R.C. 1315, 1318-20 (C.D. Cal. 1990).

United States v. Azrael, 765 F. Supp. 1239, 1245 (D.Md. 1991) (citations omitted). Congress did not intend to hold governmental entities liable under CERCLA for regulatory cleanup. So too, holding the Regional Board liable for carrying out its cleanup duties under California law and the Clean Water Act contradicts Congressional intent. Imposing liability would conflict with the primary objective of the Clean Water Act, which is to restore the quality of the nation's waters.[24]

The Ninth Circuit found the CERCLA cases holding governmental entities not liable for regulatory cleanup were inapplicable to this case simply because the Clean Water Act does not contain a specific statutory provision analogous to the CERCLA provisions exempting regulators from liability under the Act.[25] App., p. A11. In so ruling, the court ignored the policy considerations clearly applicable to both Acts. In any event, the fact that the Clean Water Act does not contain a specific exception to the NPDES permitting requirements for States performing cleanup is neither surprising nor dispositive, in light of the *distinctions* between CERCLA and the Clean Water Act.

---

[24] Petitioners do not dispute that there are instances when a state agency is acting pursuant to its proprietary function – for example, when it acts as an owner/operator of a prison with its own sewage treatment facility – and is subject to NPDES requirements. In those instances, the agency has caused an addition of pollutants to be discharged from a point source into navigable waters.

[25] The CERCLA governmental exemption provisions, 42 U.S.C. §§ 9601(20)(D) and 9607(d)(2), appear in the Appendix at pages A74 and A77, respectively.

Unlike the Clean Water Act,[26] CERCLA is not a regulatory standard-setting statute. *State of N.Y. v. Shore Realty Corp.*, 759 F.2d at 1041. CERCLA is a pollution cleanup statute, aimed at cleaning up hazardous waste sites and imposing the costs of cleanup on those responsible for the contamination. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7 (1989). CERCLA imposes liability for the costs of remedial action on all those who have caused, or in any way contributed to, the release of hazardous waste, including transporters, generators and past owners or operators of a site when a discharge occurred. 42 U.S.C. § 9607(a). Thus, it was necessary to specifically exempt from CERCLA liability those performing governmental cleanups. 42 U.S.C. §§ 9601(20)(D) and 9607(d)(2).

In contrast, Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant from a point source except in compliance with, inter alia, Section 402, 33 U.S.C. § 1342.[27] Section 402 sets the conditions under which a person responsible for adding pollutants to navigable waters from a point source may legally discharge those pollutants. As shown, the Clean Water Act contemplates that only those who have actually

---

[26] The Clean Water Act is a "comprehensive Congressional regulatory program." *United States v. Earth Sciences, Inc.*, 599 F.2d at 373.

[27] The language of Section 301(a) must be read in conjunction with Section 502(12)(A), of the Clean Water Act, which defines the term "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A). Sections 301(a) and 502(12)(A) appear in the Appendix at pages A63 and A71, respectively.

caused pollutants from the outside world to be introduced into navigable waters from a point source are liable for the discharge of that pollution. *National Wildlife Federation v. Gorsuch*, 693 F.2d at 175; *Friends of Sakonnet v. Dutra*, 738 F. Supp. at 629. There was no need for Congress to expressly exempt States from the permitting requirements of the Clean Water Act when States are engaged in their regulatory function of abating someone else's existing point source discharge of pollutants into navigable waters, *because it was never thought that permitting requirements would apply in those circumstances.*

B. Pre-CERCLA Regulatory Cleanup Actions Are Deemed to Have Been Performed Under the Same "Protective Umbrella" That Prevents States From Becoming Liable for CERCLA Cleanups

States perform cleanup and abatement actions at CERCLA sites under a protective umbrella that prevents them from becoming liable for costs or damages as owners or operators of the site when they conduct the cleanup solely in their regulatory capacity. *United States v. Azrael*, 765 F. Supp. at 1245. Further, CERCLA authorizes States to recover their cleanup costs from responsible parties if their efforts are "not inconsistent with" the NCP. *State of N.Y. v. Shore Realty Corp.*, 759 F.2d at 1041.

The costs of pre-CERCLA cleanups are also recoverable by States under CERCLA. *United States v. Northeastern Pharmaceutical*, 810 F.2d 726, 735 (8th Cir. 1986); *United States v. Mottolo*, 695 F. Supp. 615, 622 (D.N.H. 1988). And, governmental cleanups performed pursuant

to the Clean Water Act are entitled to the same regulatory protections as cleanups conducted under CERCLA. *United States v. Skipper*, 781 F. Supp. at 1111-1112 (holding that the Coast Guard was acting in its regulatory capacity when it performed a pre-CERCLA response action pursuant to Section 311 of the Clean Water Act and that it could not be held liable under CERCLA for those activities).

C. Imposing Liability on the Regional Board and EBMUD Pursuant to the Clean Water Act Undermines CERCLA

The actions taken by the Regional Board and EBMUD at Penn Mine were a pre-CERCLA regulatory cleanup.[28]

---

[28] Regional Board activities conducted at abandoned mines pursuant to California Water Code section 13305 are specifically recognized by the California Legislature to be regulatory.

> The Legislature hereby finds and declares that over the years chronic and continuing conditions of pollution and nuisance have resulted from the physical and geographic locations of property once used as industrial or business sites but not [now] in operation. The Legislature . . . finds and declares that such conditions cannot be effectively dealt with pursuant to other regulatory authority exercised by a California regional water quality control board. . . . The Legislature, therefore, further finds and declares that it is imperative, in order to remedy conditions of pollution and nuisance emanating from nonoperating industrial or business locations, such as mines, that regional water quality control boards be authorized to regulate such conditions in the manner provided in Section 13305 of the Water Code.

By requiring that they now obtain an NPDES permit for performing exactly the same functions at a pre-CERCLA site as governmental agencies perform pursuant to CERCLA,[29] the Ninth Circuit decision removes CERCLA's protective umbrella and imposes indirectly, through the Clean Water Act, what could not be imposed directly under CERCLA. This effect of the court's ruling directly undermines Congressional intent and cannot be countenanced – either under the Clean Water Act or under CERCLA.

Because they did not introduce the acid mine drainage from Penn Mine into navigable waters – that was already occurring – actions they take to abate the adverse impacts of the abandoned mine's continuing discharge of acid mine drainage should not make the Regional Board and EBMUD liable for those pollutants.

California Stats. 1969, ch. 482, § 33, p. 1088, App., p. A87. Because the legislature and not the judiciary is the main guardian of the public needs to be served by social legislation, this legislative declaration of public interest is "well-nigh" conclusive. *Berman v. Parker*, 348 U.S. 26, 32 (1954).

[29] The use of the control structures built at Penn Mine in the 1970's is basically the same approach that has been taken at the Iron Mountain Mine where remediation is overseen by EPA pursuant to CERCLA. Acid mine drainage flows into Spring Creek. The uncontaminated creek flow is diverted around the site. The creek flow that is contaminated is impounded behind Spring Creek debris dam where it is released periodically without treatment. Releases of acid mine drainage from Iron Mountain Mine are very much greater than those from Penn Mine.

CONCLUSION

Because of the lower court decision's profound impact on State efforts to abate the adverse impacts of continuing discharges of pollution to navigable waters caused by others, Petitioners request that the Court issue a writ of certiorari to review the important question presented in this petition.

DATED: July 20, 1994

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General of the
State of California

RODERICK E. WALSTON
Chief Assistant
Attorney General

DOUGLAS B. NOBLE
Acting Assistant
Attorney General

SARA J. DRAKE
Deputy Attorney General
Counsel of Record

1515 K Street, Suite 511
P.O. Box 944255
Sacramento, California
94244-2550
(916) 324-5375

*Attorneys for Petitioners
Members of California Regional
Water Quality Control Board,
Central Valley Region, in their
official capacity*

ROBERT C. HELWICK
Chief of Resources Law
East Bay Municipal Utility
District

375 11th Street
Oakland, California 94607

EDWARD BERLIN
LEONARD A. MILLER
ANDREW L. LIPPS
SWIDLER & BERLIN, CHARTERED

3000 K Street, N.W., #300
Washington, D.C. 20007
(202) 424-7500

*Attorneys for Petitioner
East Bay Municipal Utility
District*

July 20, 1994

COMMITTEE TO SAVE MOKELUMNE RIVER, a California non-profit corporation, Plaintiff-Appellee,

v.

EAST BAY MUNICIPAL UTILITY DISTRICT, a California Municipal Utility District, et al., Defendants-Appellants.

No. 93-15999

United States Court of Appeals,
Ninth Circuit

Argued and Submitted Sept. 1, 1993.

Decided Dec. 29, 1993.

Environmental group brought Clean Water Act action against municipal utility district and members of regional water quality control board, which owned and operated abandoned mine facility, alleging that facility discharged pollutants without National Pollutant Discharge Elimination System (NPDES) permit. The United States District Court for the Eastern District of California, Lawrence K. Karlton, J., found that defendants discharged pollutants into reservoir and river without permit in violation of Act. Defendants appealed. The Court of Appeals, Pregerson, Circuit Judge, held that dam used to collect acid mine drainage from abandoned mine site was subject to Clean Water Act's permit requirements.

Affirmed.

Fernandez, Circuit Judge, filed a concurring opinion.

Edward Berlin, Swidler & Berlin, Washington, DC, for defendant-appellant East Bay Mun. Utility Dist.

Sara J. Drake, Deputy Atty. Gen., Atty. General's Office, Sacramento, CA, for defendant-appellant California Water Quality Control Bd. Members, Central Valley Region.

Adria Y. LaRose, William S. Curtiss, Sierra Club Legal Defense Fund, Inc., Maria Savasta Kennedy, Michael W. Bien, Rosen, Bien & Asaro, San Francisco, CA, for plaintiff-appellee.

Appeal from the United States District Court for the Eastern District of California.

Before: REAVLEY,* PREGERSON, and FERNANDEZ, Circuit Judges.

PREGERSON, Circuit Judge:

The East Bay Municipal Utility District and the members of the California Regional Water Quality Control Board, Central Valley Region, defendants below, appeal the district court's order granting partial summary judgment in favor of the Committee to Save the Mokelumne River. The district court, in a well-written, well-reasoned opinion, found that defendants owned and operated the Penn Mine facility, and that the facility discharged pollutants into the Camanche Reservoir and Mokelumne River without a permit, in violation of the Clean Water Act, 33 U.S.C. §§ 1251-1376. On appeal, defendants contend that (1) Mine Run Dam, part of the Penn Mine facility, is not subject to the discharge permit requirements of the Clean Water Act; (2) the Water Board is immune from liability

---

*Hon. Thomas M. Reavley, United States Circuit Judge, U.S. Court of Appeals for the Fifth Circuit, sitting by designation.

under the Act; and (3) summary judgment was improper because a triable issue of material fact exists whether there has been an "addition of pollutants" within the meaning of the Clean Water Act.

We have jurisdiction under 28 U.S.C. § 1292(b). We affirm.

BACKGROUND

The Penn Mine property is the site of an abandoned copper and zinc mine that operated intermittently from the 1860s through the 1950s. The companies that mined the site left behind reactive mine tailings, waste rock, and excavated ores. When exposed to oxygen and water, these materials form "acid mine drainage," which contains high concentrations of aluminum, cadmium, copper, zinc, iron, and sulfuric acid. Unless impeded, rain water falling on the site carries this acid mine drainage downhill, in the form of surface runoff, into the Mokelumne River.

In the 1960s, the East Bay Municipal Utility District (the "District") acquired a portion of the Penn Mine property to build the Camanche Reservoir. The District owns water rights on the Mokelumne and supplies water to towns and cities east of San Francisco. In 1978, the District, joined by the California Regional Water Quality Control Board, Central Valley Region (the "Board"), constructed the Penn Mine Facility (the "facility") in an attempt to reduce the threat of continued toxic runoff from the site. The facility consists of Mine Run Dam and the Mine Run Dam Reservoir surface impoundment, along with a series of other impoundments, drainage ditches, pipes, valves, culverts, and channels. The Mine

Run Dam and most of the Mine Run Dam Reservoir are located on property owned by the District. A small portion of the Mine Run Dam Reservoir extends onto property owned by a defunct mining company.

The facility was designed to capture contaminated surface water flowing through the site, and to contain and evaporate the water through a ponding and recirculation system, preventing the contamination from reaching the reservoir and river below. Each of the two drainages once occupied by Hinkley Run and Mine Run creeks, which formerly flowed through the site, now contains a cascade of three impoundments. Water contaminated with toxic pollutants runs off the mine site and collects in the upper impoundments and then flows to the lower impoundments, eventually collecting in the Mine Run Dam Reservoir. A pump and pipe owned by the Board recirculates polluted water from Mine Run Dam Reservoir back into the upper impoundments located in the former Mine Run Creek drainage basin. Defendants operate that pump.

The facility also consists of two principal diversion ditches that divert the surface flows of Hinkley Run and Mine Run creeks around the abandoned mine site. Those diversion ditches are intended to isolate the facility from the unpolluted flows of these two creeks by diverting the streams around the facility and directly into the Mokelumne River and Camanche Reservoir, below.

As part of the facility's ongoing operation, various pipes, channels, and gullies carry polluted runoff from the mine tailings and dikes into the Mine Run Dam Reservoir and other facility impoundments. In addition,

from time to time, water and drainage collected in the Mine Run Dam Reservoir have passed over the spillway or through the dam's discharge valve into the Mokelumne River and Camanche Reservoir.

The Clean Water Act (the "Act"), 33 U.S.C. §§ 1251-1376, is intended to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In pursuit of this goal, the Act prohibits the "discharge of any pollutant" into navigable waters from any "point source" without a permit. *See* 33 U.S.C. § 1311(a) (except as otherwise provided in the Act, the discharge of any pollutant by any person shall by [sic] unlawful); § 1342(a) (authorizes EPA Administrator to permit some discharges of pollutants under a National Pollutant Discharge Elimination System ("NPDES")); § 1362(12) (defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source").

The Committee to Save the Mokelumne River (the "Committee") initiated this suit against the District and members of the Board under the citizen suit provisions of the Act, 33 U.S.C. § 1365. The Committee seeks a judgment declaring that defendants have discharged pollutants from the Penn Mine facility without a permit, in violation of the Clean Water Act, and enjoining defendants from discharging pollutants from the facility until they have obtained an NPDES permit to do so. The Committee also seeks an order requiring defendants to devise a remedial plan to remove and dispose of contaminated sediment in the reservoir.

Defendants moved to dismiss this action on a number of procedural and substantive grounds. At the same time, the Committee moved for summary judgment on the issue of defendants' liability under the Act. The district court denied defendants' motion and granted judgment in favor of the Committee on the issue of liability.

On appeal from the district court's order of summary judgment in favor of the Committee, defendants raise four issues. They contend that the district court erred in granting partial summary judgment in favor of the Committee because (1) Mine Run Dam is not subject to the discharge permit requirements of the Clean Water Act; (2) a material issue of fact exists as to whether defendants have "discharged a pollutant" within the meaning of the Act; (3) defendants' activities in constructing and operating the facility are regulatory, and therefore cannot constitute "additions of pollutants" under the Act; (4) the Eleventh Amendment immunizes defendants from liability under the Clean Water Act. We address each of these arguments in turn.

DISCUSSION

A. *Is Mine Run Dam subject to the Clean Water Act's permit requirements?*

To establish a violation of the Act's NPDES requirements, a plaintiff must prove that defendants (1) discharged, i.e., added (2) a pollutant (3) to navigable waters (4) from (5) a point source. *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982). Defendants concede that acid mine drainage is a "pollutant," that the

Mokelumne River is among the covered "navigable waters," and that the spillway and valve of the Mine Run Dam and Reservoir are "point sources"[1] from which polluted water has entered the Mokelumne River. They contest only the issue whether they have "added" pollutants to the Mokelumne.

Defendants argue that under well-established case law, the Mine Run Dam is not subject to the Clean Water Act's permit requirements because it is a dam that "does no more than impound navigable waters and impede their flow in the Mokelumne River." In support of this contention, defendants rely on two decisions that held that the specific dams at issue in those cases were not subject to the discharge permit requirements because they did not "discharge pollutants," i.e., " 'add' pollutants from the outside world to" navigable water. *See National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580, 584 (6th Cir. 1988); *Gorsuch*, 693 F.2d at 174-75. These cases are inapposite here because the Penn Mine facility *does* "discharge pollutants" as that term is defined by the Act and relevant regulations.

---

[1] The court in *Gorsuch* noted that the pipes and spillways of dams are "point sources" under the Act, and therefore subject to the Act's discharge permit requirements:

> The pipes or spillways through which water flows from the reservoir through the dam into the downstream river clearly fall within [the] definition [of a "point source"], and the EPA has required NPDES permits for the discharge of grease, oil, or trash through the outlet works of a dam.

Gorsuch, 693 F.2d at 165 n.22.

In both *Consumers Power Co.* and *Gorsuch*, plaintiffs sought to compel dam operators to comply with the discharge permit requirements of the Clean Water Act. In *Gorsuch*, plaintiffs argued that dam-induced water quality changes caused by the impoundment and release of water were a "discharge of pollutants" within the meaning of the Act.[2] 693 F.2d at 161. Plaintiffs in *Consumers Power Co.* argued that the destruction of aquatic life by a dam's turbines and the release downstream of the remains were a "discharge of pollutants" within the meaning of Act. In both cases, the court held that the dams at issue did not "discharge a pollutant" because the dams did not *add* pollutants "from the outside world." *Consumers Power Co.*, 862 F.2d at 584; *Gorsuch*, 693 F.2d at 174-75. Neither case categorically exempts all dams from the discharge permit requirements of the Clean Water Act.

This case clearly is distinguishable from *Gorsuch* and *Consumers Power Co.* because the Penn Mine facility does not pass pollution from one body of navigable water into another. Rather, the source of pollution added to the Mokelumne River is "surface runoff that is collected or channelled by" defendants from the abandoned mine site. Such surface runoff is expressly listed under the definition of "discharge of a pollutant" contained in the regulations. *See* 40 C.F.R. § 122.2 ("Discharge of a pollutant means . . . additions of pollutants into waters of the United States from: surface runoff which is collected or channelled by man").

---

[2] "Discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12).

In this case, defendants have admitted that acid mine drainage from the abandoned mine site is channelled into the Penn Mine facility and collects in the Mine Run Dam Reservoir. District Answer ¶¶ 18, 24; Board Answer ¶¶ 18, 22. Defendants also admit that "water and drainage collected in Mine Run Dam Reservoir had, from time to time, passed over the spillway or through the valve into the Mokelumne River and Camanche Reservoir." District Answer ¶ 21. *See also* Board Answer ¶¶ 18, 21, 22. These admissions, in turn, conclusively establish that defendants "discharge a pollutant" from the Penn Mine facility within the meaning of the Clean Water Act, making them subject to the Act's permit requirements.

B. *Have defendants raised a genuine issue of material fact so as to preclude summary judgment for the Committee?*

Defendants also argue that a material issue of fact exists as to whether there is an "addition of pollutants," making improper the district court's grant of summary judgment. Specifically, defendants rely on evidence that the acidity of water flowing into the Mokelumne River through the Penn Mine facility is not greater now than it was before the dam was constructed. In effect, defendants contend that they are liable under the Clean Water Act only if the facility produces a net increase in the acidity of the surface runoff compared to the acidity of the runoff before the facility was constructed.

This argument misapprehends the focus of the Clean Water Act. The Act does not impose liability only where a point source discharge creates a net increase in the level of pollution. Rather, the Act categorically prohibits any

discharge of a pollutant from a point source without a permit. 33 U.S.C. §§ 1311(a), 1342(a); *Consumers Power Co.*, 862 F.2d at 582. Thus, the factual issue raised by defendants concerning the historical level of pollution compared to the current level of pollution is not material to the resolution of the Committee's claim, and therefore does not preclude summary judgment on the issue of liability.

Defendants have already admitted that acid mine drainage is channelled into and collects in the Penn Mine facility, and then is released over the Mine Run Dam's spillway or through its valve into the Camanche Reservoir and the Mokelumne River. Consequently, they have admitted to each of the elements needed to establish liability under the Clean Water Act. Defendants have (1) discharged a pollutant (i.e., collected and channeled [sic] surface runoff containing acid mine drainage into the reservoir and then added the polluted runoff); (2) into navigable waters (i.e., the Mokelumne); (3) from a point source (i.e., the dam's spillway and valve); (4) without a discharge permit. *See Gorsuch*, 693 F.2d at 165. Because the statute does not require the Committee to show that a greater level of pollution enters the Mokelumne now than was the case before the Penn Mine facility was constructed, the district court properly granted judgment in the Committee's favor on the issue of liability.

C. *Are actions taken by regulatory authority to prevent or reduce discharges subject to the Clean Water Act's permit requirements?*

Defendants also argue that "the State cannot be held liable [under the Clean Water Act] for the activities which it has performed pursuant to its regulatory responsibilities." Although they concede that no case has so held, they contend that analogous cases under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") *do* lend support to their argument.

As the district court pointed out, in the cases cited by defendants, the absence of governmental liability under CERCLA rests squarely on express statutory exemptions. *See* Order at 34-35 & n.32 (citing 42 U.S.C. §§ 9607(a)(1) & (2), and 42 U.S.C. § 9601). The Clean Water Act contains no such exemption. Given the absence of *any* statutory authority to exempt the Board or District from liability under the Clean Water Act, the district court did not err in finding that defendants are liable under the Act.

D. *Does the Eleventh Amendment immunize the Water Board from liability under the Clean Water Act?*

The Water Board argues that "the District Court could not consider the construction that took place prior to the filing of the lawsuit because of Eleventh Amendment considerations." However, the Committee seeks only prospective equitable relief, which is not barred by the Eleventh Amendment. *See Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 104-05, 104 S.Ct. 900, 910, 79 L.Ed.2d 67 (1984) (citing *Ex Parte Young*, 209 U.S. 123,

155-56, 28 S.Ct. 441, 452, 52 L.Ed. 714 (1908)). Furthermore, none of the authorities cited by defendants prohibit the district court from considering defendants' past conduct as it relates to ongoing or future violations. Thus, defendants' Eleventh Amendment argument is without merit.

CONCLUSION

We conclude that the district court properly granted summary judgment in favor of the Committee on the issue of defendants' liability under the Clean Water Act.

AFFIRMED.

FERNANDEZ, Circuit Judge, concurring:

I concur, but write separately because my position may be somewhat more narrowly based than the position of the majority.

As I understand it, the pollutants in question used to be carried into the Mokelumne River by Mine Run Creek and Hinkley Run Creek. The water from those creeks, and other water, ran across the tailings from the mines and became polluted. The creeks then carried that water to the river. The project has diverted those creeks so that they will stay clean and has captured polluted runoff so that it can be released in a more measured way. In other words, it seems that unregulated quantities of pollutants were flowing into the river and causing fish kills and the like long before EBMUD and the Board did anything at all. Those entities sought to eliminate the disasters caused by that unregulated flow and that is why the project was

built. The result has been a significant improvement in the river's environment and a boon to aquatic life.

The majority appears to agree with appellee's position that the project is a point source in the sense that the Environmental Protection Agency could not determine that a NPDES permit was not required. I am not so sure. It seems to me that, given the history of this project, the EPA could properly have determined that this really is much more like the dams it dealt with in *National Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988), and *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), than it is like the typical point source that truly does add pollution to navigable waters. *See* 33 U.S.C. § 1362(12). If it had, we would have shown that determination great deference.[1] *See Consumers Power*, 862 F.2d at 584-85. It did not. In fact, the information before the district court and before us indicates that the EPA considers the project to be a point source, which does require a permit containing numerous onerous conditions.

Appellants earnestly argue that the EPA's approach, and that of the appellee's, will not serve the long-term purpose of bettering the aquatic environment. They indicate that it takes no genius or epopt to see what the message will be. Do nothing! Let someone else take on the responsibility. Let the water degrade, let the fish die, but protect your pocketbook from vast and unnecessary expenditures. Do not try to bring some order out of environmental chaos. In short, appellants suggest that no

---

[1] One could even consider whether primary jurisdiction principles should be applied. *See United States v. General Dynamics Corp.*, 828 F.2d 1356, 1362-66 (9th Cir. 1987).

Odysseus or Daedalus crafted the policy which we are now asked to follow. Perhaps they are correct; I suspect they are.

Nevertheless, we are not policymakers. We must simply apply the law. The majority opinion demonstrates *that* with great clarity.

Therefore, I concur.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

COMMITTEE TO SAVE THE MOKELUMNE RIVER, a California non-profit corporation,

Plaintiff,

v.

EAST BAY MUNICIPAL UTILITY DISTRICT, a California municipal utility district, and the REGIONAL WATER QUALITY CONTROL BOARD-CENTRAL VALLEY REGION, a California state agency,

Defendants.

_____/

NO. CIV. S-91-1372 LKK

ORDER

East Bay Municipal Utility District ("EBMUD") and members of California Regional Water Quality Control Board ("RWQCB") move to alter or amend this court's Order dated May 21, 1992, under Fed. R. Civ. P. 59(e). In the alternative, the defendants move for reconsideration of the Order pursuant to Local Rule 230(k).

Because the RWQCB was not given a full and fair opportunity to be heard on numerous issues of law and fact that affect the RWQCB's rights and liabilities prior to issuance of that Order, defendants' motions for

reconsideration are GRANTED.[1] My Order dated May 21, 1992, is hereby vacated and amended as follows:

Plaintiff, the Committee to Save the Mokelumne River ("Committee"), sues defendants EBMUD and members of the RWQCB in their official capacity under the citizen suit provisions of the Clean Water Act. Plaintiff contends that EBMUD and the RWQCB, alleged joint owners and operators of the Penn Mine facility, have discharged certain toxic pollutants from the facility into the Camanche Reservoir and Mokelumne River near Campo Seco, California without the discharge permit required by the Clean Water Act. Plaintiff seeks a judgment declaring that defendants' discharge of pollutants from the facility without a permit violates the Act, and enjoining defendants from discharging pollutants from the facility until they have secured a permit under the Act. It also seeks an order requiring defendants to devise a remedial plan to remove and safely dispose of all contaminated sediment in Camanche Reservoir that was caused in whole or in part by discharges from the facility since its construction.

Before the court are the defendants' motions to dismiss or in the alternative to abstain from hearing the case. The court also has before it plaintiff's motions for partial

---

[1] While motions to reconsider are subject to limitations under the law of the case doctrine, *see, e.g., Milgard Tempering, Inc. v. Selas Corp. of America*, 902 F.2d 703, 715 (9th Cir. 1990), that body of law is a tool to be used by judges to "help manage their own affairs" rather than by the parties against one another. *Lockert v. United States Dep't of Labor*, 867 F.2d 513, 518 (9th Cir. 1989). Under the circumstances, law of the case does not act as a barrier to the court reconsidering its own nonfinal order.

summary judgment as to EBMUD and RWQCB's liability under the Act.

I.

FACTS AND BACKGROUND[2]

During the 1850's and through the 1950's, the Penn Mine property near what is now Camanche Reservoir in Calaveras County, California, was mined for copper and zinc. The companies that mined the site left behind exposed mine "tailings," reactive waste rock and excavated ores, which, when exposed to oxygen and water, form "acid mine drainage" ("AMD") containing high concentrations of aluminum, cadmium, copper, zinc, iron and sulfuric acid. In about 1966, EBMUD acquired a portion of the abandoned Penn Mine property in order to build the Camanche Reservoir. EBMUD Answer ¶ 14.

Prior to 1978, pollution entering the Camanche Reservoir and the Mokelumne River as runoff from the site had resulted in several fish kills.[3] In that year, EBMUD and the RWQCB built the Penn Mine facility in an attempt to reduce AMD and other polluted runoff. EBMUD Answer at 3; RWQCB Answer ¶¶ 16, 18 and 20. The facility

---

[2] Unless described as an allegation, in this section the court recites the undisputed background facts concerning these motions. Certain other disputed and undisputed facts are adverted to in the course of disposition of the motions.

[3] *See* California RWQCB, Central Valley Region, Res. No. 78-55, "Request to Abate Pollution from Penn Mine Property and New Penn Mines, Inc., a Nonoperating Mine" (April 28, 1978) at 1. The court takes judicial notice of the Regional Board Resolution and its contents. *See* Fed. R. Evid. 201.

consists of Mine Run Dam and the Mine Run Dam Reservoir surface impoundment, combined with a series of six smaller impoundments, and various drainage ditches, pipes, valves, culverts and channels. The facility was designed to capture contaminated surface water flowing through the site, and to contain and evaporate the water through a ponding and recirculation system.[4]

The facility contains ditches which divert some of the surface flows of Mine Run Creek and Hinkley Run Creek away from the site's enclosed recirculation impoundment system. EBMUD Answer ¶ 20; RWQCB Answer ¶ 20; Bond Report at 10; Rozaklis Decl., plaintiff's Ex. 3C in supp. of SJ against EBMUD ¶ 5. The two creeks had historically flowed through the exposed mine tailings and waste rock on the site, increasing the flow of heavy metal laden effluent into the Mokelumne River. Bond Report at 10. Although the design and maintenance of the diversion berms and channels result in the seepage of some water through the berms of the diversion ditches into the

---

[4] *See* 1979 Memorandum of Understanding ("MOU"), plaintiff's Ex. 1 in support of motion for SJ against the RWQCB, at 1; *see also* Penn Mine Toxic Pits Cleanup Act Technical Investigation Report, Groundwater Protection and Investigation Section of the Central Valley RWQCB (Nov. 3, 1988), Steven R. Bond ("Bond Report"); Vaughn Aff. in support of RWQCB's opp'n to SJ ¶¶ 5, 10.

While the RWQCB admits that the Bond Report contains "certain statements [that] are factually correct," it asserts that the Bond Report was never reviewed or approved by the Board, and thus denies that the report is a statement of fact attributable to the State of California. RWQCB opp'n to motion for SJ at 5.

impoundments, the principal surface flows of those creeks now flow around, rather than into, the facility.[5]

Each of the two drainages formerly occupied by Hinkley Run and Mine Run Creeks now contain a cascade of three evaporative ponds or impoundments which converge into Mine Run Dam Reservoir. Water flows into the facility from the surrounding mine site, and collects in the upper impoundments. Bond Report at 10, 11, fig. 3. They then flow to the lower impoundments, eventually collecting in the Mine Run Dam Reservoir. *Id.* The contaminated water is then recirculated from Mine Run Dam Reservoir through a pump and pipe system operated by EBMUD and located on EBMUD property, back into the upper impoundments. *Id.*; EBMUD Answer ¶ 19. When the upper impoundments reach full capacity, the water flows back down to the lower impoundments, and so the cycle continues. Bond Report at 10.

Although Mine Run Dam itself is not constructed of materials that react with the acidic waters impounded by the Dam, reactive mine tailings, waste rock, ore and nonreactive materials from the site were used to construct the dikes and sidewalls of the water impoundments at the facility.[6] Plaintiff alleges that because the impoundments

---

[5] Rozaklis Decl. ¶ 5 in supp. of SJ against EBMUD; Howard Aff. in supp. of RWQCB's opp'n to SJ ¶¶ 5-10; Rozaklis Decl. in supp. of SJ against RWQCB ¶ 3.

[6] Maest Aff., plaintiff's Ex. 3 in supp. of SJ against EBMUD ¶ 5; EBMUD Answer ¶ 25; Howard Aff. in supp. of RWQCB's opp'n to SJ ¶ 22; August 1992 Site Characterization Report prepared for the California RWQCB by Davy Environmental ("Davy Report"), Kennedy Aff., Ex. 1 in supp. of SJ against RWQCB, drawing 021-103, at 2-4, 2-6, 2-26.

located on the EBMUD property and the surrounding area are constructed with exposed reactive materials, the waters coming in contact with the impoundments become contaminated.

Although the facility's impoundment and recirculation system was intended to function as evaporative holding ponds, MOU at 1-2, the plaintiff contends that the impoundments operate as reactive pools which further concentrate the heavy metals and facilitate the formation of AMD. Maest Aff. ¶¶ 5-7; Bond Report at 1, 33. EBMUD and the RWQCB deny that the impoundment of waters by Mine Run Dam has itself contributed to the creation of AMD at the Penn Mine site. Nawrocki Aff. in supp. of EBMUD's opp'n to SJ ¶¶ 30-33; Sullivan Aff. in supp. of RWQCB's opp'n to SJ ¶¶ 3, 9; RWQCB Answer ¶ 25. They also deny that the Dam has caused any increase in the acidity or metal concentrations in the waters actually reaching the Mokelumne River and Camanche Reservoir since the Dam was constructed. Nawrocki Aff. ¶¶ 21-29.

Both the Mine Run Dam and most of the Mine Run Dam Reservoir are located on property owned by EBMUD. EBMUD Answer ¶ 17. The RWQCB owns the pump and pipe system, RWQCB Answer ¶ 19, Lee Aff. in supp. of RWQCB's opp'n to SJ ¶ 4, and pays for the electricity which runs the pumps. Lee Aff. ¶ 4.

Between 1976 and 1986, an average of over 19 million gallons per year of water containing toxic pollutants was discharged from the facility into the Mokelumne River and the Camanche Reservoir. EBMUD Answer ¶ 26; RWQCB Answer ¶¶ 1, 26. The Mine Run Dam Reservoir

released contaminated waters through a controlled discharged valve with hand crank controls located on the Mine Run Dam and through the spillway adjacent to Mine Run Dam into the Camanche Reservoir and the Mokelumne River. EBMUD Answer ¶¶ 21, 22; RWQCB Answer ¶ 21. Until the recent heavy rains, there have been no releases over or through the Mine Run Dam since May 1986. Second Bishop Aff. ¶ 11; RWQCB Answer ¶ 21.

The Mokelumne River and Camanche Reservoir are navigable waters of the United States. EBMUD Answer ¶ 38; RWQCB Answer ¶ 39. The Mine Run Dam Reservoir contains pollutants. EBMUD Answer ¶¶ 21, 24; RWQCB Answer ¶¶ 18, 25. Some AMD from the New Penn Mine site flows into Hinkley Run and Mine Run Creeks and then into Mine Run Dam Reservoir. EBMUD Answer ¶ 22; RWQCB Answer ¶ 22. Neither defendant has ever applied for, nor possesses, a National Pollution Discharge Elimination System permit for their release of waters from Mine Run Dam Reservoir to the Camanche Reservoir and the Mokelumne River. EBMUD Answer ¶ 1; RWQCB Answer ¶ 43.

II

DEFENDANTS' MOTIONS TO DISMISS

The defendants have moved to dismiss on the various grounds discussed in detail below. The standards to be applied on a motion to dismiss are well-known and need not be repeated here. *Johnson v. City of Chico*, 725 F. Supp. 1097 (E.D. Cal. 1989). I begin with a background discussion of the Clean Water Act, and then turn to analysis of defendants' various arguments.

A. The Clean Water Act

The Clean Water Act, 33 U.S.C. §§ 1251-1376, is intended to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *Id.* § 1251(a). The Act seeks to achieve this objective by prohibiting, except under specified conditions, all discharges of pollutants from identifiable sources into the waters of the United States. *Id.* § 1342. As a means of achieving and enforcing effluent limitations, the Act establishes a comprehensive scheme for federal regulation of water pollution known as the National Pollution Discharge Elimination System ("NPDES"). *Id.* Under the NPDES, it is unlawful to discharge pollutants without obtaining and complying with a permit governing the quantity and quality of discharges. *Trustees for Alaska v. EPA*, 749 F.2d 549, 553 (9th Cir. 1984). The Act provides that unless authorized pursuant to an NPDES permit, the "discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a).

Although Congress, through the Act, addressed a national problem, it sought to " 'recognize, preserve, and protect the primary responsibilities and rights of States,' in the restoration and maintenance of their waters and in the application of the Act." *Boise Cascade Corp. v. U.S. EPA*, 942 F.2d 1427, 1429 (9th Cir. 1991) (quoting 33 U.S.C. § 1251(b)). As permitted by the Act, the Administrator of the EPA has delegated to the State of California the authority to issue NPDES permits, subject to EPA objection. 33 U.S.C. § 1342(b),(d); *Boise Cascade*, 942 F.2d at 1430; *Shell Oil Co. v. Train*, 585 F.2d 408, 410 (9th Cir. 1978). The California State Water Resources Control Board and its various Regional Water Quality Control

Boards are responsible for enforcement of the Act in California and for issuing NPDES permits. *Boise Cascade*, 942 F.2d at 1430. California's plan for issuance of NPDES permits is found at California Water Code §§ 13370-89.

Plaintiff alleges claims pursuant to the citizen suit provision of the Clean Water Act, which provides:

> (a) . . . any citizen may commence a civil action on his own behalf – –
>
> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation[7] under this chapter or (B) an order issued by the Administrator or State with respect to such a standard or limitation. . . .

---

[7] "Effluent limitation" is defined as "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological and other constituents which are discharged from point sources into navigable waters. . . . " 33 U.S.C. § 1362(11). Those effluent standards and limitations enforceable by citizens are further defined in section 1365(f) to include "an unlawful act under subsection (a) of section 1311" which prohibits the discharge of any pollutant into the water of the United States except in compliance with an NPDES permit. 33 U.S.C. § 1311(a).

"Pollutant" includes chemical wastes, biological materials, and industrial and municipal waste. 33 U.S.C. § 1362(6). "Toxic pollutant" includes those pollutants or combination of pollutants which, after discharge and upon direct or indirect exposure cause death, disease, or behavioral or physiological malfunctions in the organism or the offspring of the organism exposed to the pollutant. 33 U.S.C. § 1362(13).

> The district courts shall have jurisdiction . . . to enforce such an effluent standard or limitation, or such an order. . . .

33 U.S.C. § 1365(a)(1).

B. Subject Matter Jurisdiction

Defendants assert that this court lacks subject matter jurisdiction over plaintiff's claim because the State and Regional Water Boards have determined that no NPDES permit is required for the Mine Run Dam and Reservoir. According to defendants, plaintiff's challenge to that determination lies in state court. Defendants' contention must be rejected because both as a factual and legal matter, it lacks merit. Below, I explain that defendants have failed to demonstrate that the State or Regional Boards have determined that a permit is not required for the Mine Run Dam and Reservoir discharges. Moreover, as I also explain, even if such a determination has been made, it would not divest this court of jurisdiction over plaintiff's citizen suit under the Clean Water Act.

The relevant history of the State and Regional Boards' actions concerning Mine Run Dam and Reservoir commences with two letters from William H. Crooks, Executive Director of the Regional Board, responding to requests by the California Sportfishing Protective Alliance that the Board require an NPDES permit for the Mine Run Dam and Reservoir. *See* Bishop Decl. in supp. of EBMUD's mot. to dismiss, Exs. 7-10. In the first letter, dated April 4, 1989, Crooks writes,

> Simply putting a permit on the East Bay MUD structure which releases these waters, when necessary, will do little towards gaining a water quality benefit. Therefore, we do not plan to propose to permit the release of these toxic discharges.

Id., Ex. 8.

In the second letter, dated November 1, 1989, Crooks writes,

> I do not agree with you that the East Bay MUD should be required to obtain an NPDES permit. My reasons were stated in my 4 April letter to you. East Bay MUD is not responsible for the pollution. The pollution comes from the runoff from the nonoperating Penn Mine.

Id., Ex. 10.

On April 27, 1990, the Regional Board adopted Resolution 90-128, entitled "Waiving Discharge Requirements and to Exempt East Bay Municipal Utilities District, Mine Run Dam Reservoir, Penn Mine, Calaveras County from Requirements and Prohibitions of the Toxic Pits Cleanup Act." RWQCB's memo in supp. of mot. to dismiss, Ex. 1. Under that resolution and pursuant to California Water Code § 13269[8] and California Health & Safety Code

---

[8] California Water Code § 13269 was adopted before the State NPDES permit program and authorizes the Regional Board to waive various state discharge requirements "as to a specific discharge or a specific type of discharge where such waiver is not against the public interest." This waiver provision does not appear in the section of the California Water Code describing the State's NPDES permit program. Cal. Water Code §§ 13370-89.

§ 25208.20,[9] the Regional Board exempted Mine Run Dam and Reservoir from the waste discharge requirements of the Toxic Pits Cleanup Act ("TPCA"), California Health & Safety Code §§ 25208-08.21. Nothing in the resolution demonstrates that the Regional Board addressed the question of whether the Mine Run Dam and Reservoir was exempt from NPDES permit requirements.

On May 25, 1990, plaintiff and the California Sportfishing Protection Alliance filed a petition with the State Board seeking review of Resolution 90-128. *See* plaintiff's opp'n to EBMUD's mot. to dismiss, Ex. 1 at 1. Crooks wrote to counsel for the State Board, asserting "it is the position of both the State Water Resources Control Board, and the Regional Board, that the discharges from the Penn Mine are not point source discharges, and are therefore not subject to NPDES permits." Bishop Decl., Ex. 11.

In Order No. WQ 91-14, adopted December 12, 1991, the State Board noted that petitioners' first contention is that Mine Run Dam and Reservoir is not entitled to an exemption from TPCA, *id.* at 7,[10] and that petitioners'

---

[9] Section 25208.20 authorizes the Regional Board to grant an exemption from the discharge permit requirements of the TPCA if the surface impoundment meets certain requirements.

[10] On January 6, 1992, plaintiff and the California Sportfishing Protection Alliance filed a petition for writ of mandamus in Sacramento County Superior Court pursuant to California Water Code § 13330 and California Civil Procedure Code § 1094.5, challenging the State Board's decision to uphold the Regional Board's exemption of Mine Run Dam and Reservoir from the TPCA. *See* RWQCB's memo in supp. of mot. to dismiss, Ex. 4. Plaintiff in that action alleged that the exemption decision is in violation of the TPCA, the Porter-Cologne Water Pollution Control Act, and the Federal Water Pollution Control Act.

second contention is that Mine Run Dam and Reservoir should be subject to an NPDES permit. *Id.* at 36. In addressing the second contention, the Board noted that in September 1990, the EPA had listed Mine Run Dam and Reservoir as a point source under the Clean Water Act § 304(l)(1)(C), 33 U.S.C. § 1314, and that EBMUD and the State Board had asked EPA to reconsider its action. *Id.* The State Board concluded that "[b]ecause negotiations are pending with another administrative agency, it would not be appropriate for this Board to rule on this issue at this time." *Id.* at 36-37. The Board also specifically noted,

> Petitioners have filed suit in federal court against EBMUD and the Regional Board regarding this same issue. (*Committee to Save the Mokelumne River v. East Bay Municipal Utility District and Regional Water Quality Control Board-Central Valley Region*, U.S. District Court Easter [sic] district of California, CIV-S-91-1372 LKK PAN, filed October 4, 1991). This court action is another reason why a State Board determination on this issue is not appropriate.

Id. at 37. The Board then "dismissed" petitioners' contention.

This record simply fails to establish that the State or Regional Boards have determined that Mine Run Dam and Reservoir is exempt from the NPDES permit requirement. As plaintiff points out, the Crooks' letters and his memo to the State Board do not reflect any decision by the Regional Board itself,[11] and the Regional Board did

---

[11] Under the California Water Code, the Regional Board is comprised of nine members. Although the Board may delegate

not address the NPDES permit question in Resolution No. 90-128. In turn, the State Board specifically declined to take any position on the question of whether Mine Run Dam and Reservoir should be subject to an NPDES permit.

Moreover, even if the State or Regional Board had determined that the Mine Run Dam and Reservoir was exempt from the NPDES permit requirement, that decision would not divest this court of subject matter jurisdiction over plaintiff's citizen suit. It is, of course, true that if the Board had issued a discharge permit for Mine Run Dam and Reservoir, a substantive challenge to the conditions of the permit would lie in state, not federal, court.[12] In the matter at bar, however, no such permit has been issued. Moreover, had either Board provided an exemption it would have exceeded its authority. Neither the EPA nor the State is given authority under the Act to exempt from the NPDES permit program any point

---

duties to is executive officer, that delegation may not encompass applications for judicial enforcement, the promulgation of any regulation, or the issuance or modification of waste discharge requirements. Cal. Water Code § 13223(a). There is nothing in the Code to suggest that the executive director unilaterally may exempt an entity from the NPDES permit requirement; indeed, there is nothing in the Code to suggest that the Board itself has the authority to grant such an exemption.

[12] State, not federal, courts have jurisdiction to consider challenges to the substantive adequacy of NPDES permits issued to dischargers by state agencies. *See District of Columbia v. Schramm*, 631 F.2d 854, 862 (D.C. Cir. 1980); *Natural Resources Defense Council, Inc. v. Outboard Marine Corp.*, 702 F. Supp. 690, 694 (N.D. Ill. 1988); and *Chesapeake Bay Found., Inc. v. Virginia State Water Control Bd.*, 495 F. Supp. 1229, 1234 (E.D. Va. 1980).

source that discharges or may discharge pollutants. *See* 33 U.S.C. § 1311(a); Cal. Water Code § 13377; *see also Carr v. Alta Verde Industries, Inc.*, 931 F.2d 1055, 1060 (5th Cir. 1991) (EPA has no discretion under the Act to exempt classes of point sources from the permit requirement); *Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977) (same); *Hudson River Fishermen's Ass'n v. City of New York*, 751 F. Supp. 1088, 1099 (S.D.N.Y. 1990), *aff'd*, 940 F.2d 649 (2d Cir. 1991) (New York Department of Environmental Conservation lacks power to grant *de facto* exemption from permit procedures of the Clean Water Act).[13]

Accordingly, defendants' subject matter jurisdiction argument is without merit and must be rejected.

C. Deference to EPA's Primary Jurisdiction[14]

Defendants assert that the court should defer to EPA's "primary jurisdiction" and dismiss or stay this action because of the pending EPA administrative proceeding concerning whether Mine Run Dam and Reservoir includes point sources subject to the NPDES

---

[13] An action challenging an ultra vires act under the Clean Water Act would arise under federal law, and thus this court would have jurisdiction over such a suit pursuant to 28 U.S.C. § 1331.

[14] In their motion filed December 11, 1991, defendants urged abstention pending the State Board's consideration of plaintiff's petition for review of the Regional Board's Resolution No. 90-128. That request is now moot because the State Board issued its decision on or about December 12, 1991.

permitting process.[15] As I explain below, both precedent and the EPA's views counsel against staying these proceedings.

1. Status of the Administrative Proceeding

EPA Region IX has initiated an administrative process to implement section 304(l) of the Clean Water Act with respect to surface waters in California, 33 U.S.C. § 1314(l), because it disapproved both the State's failure to include the Mokelumne River on its impaired waters list and its failure to include the Mine Run Dam and Reservoir on the State's point source list.[16] On September

---

[15] Following the hearing on these motions, the court asked EPA to specify the issues and the status of the pending administrative proceeding. I also invited EPA to submit an amicus curiae brief providing its views on whether the court should defer to EPA's primary jurisdiction and stay or dismiss this action pending completion of the NPDES permitting process. The EPA has filed a letter brief and the parties were given the opportunity to file responsive briefs.

[16] Section 304(l) requires the State to include on the "short list" waters which, after application of technology-based effluent limits, cannot reasonably be anticipated to maintain numeric or narrative water quality standards for the toxic pollutants listed under § 1317(a) of the Act due entirely or substantially to discharges from point sources. 33 U.S.C. § 1314(l)(1)(B). The State is also obligated to submit a "source list" which includes point sources which are discharging § 1317(a) pollutant(s) into the waters listed on the short list. *Id.* at § 1314(l)(1)(C). This source list must also include the amount of pollutant which the point source is discharging into the water. *Id.* The State is required to develop and submit an individual control strategy ("ICS") for each point source on the source list. *Id.* § 1314(l)(1)(D).

28, 1990, EPA Region IX, pursuant to 40 C.F.R. Pt. 123.46(f), assumed permitting authority for the facility, reflecting its "preliminary determination that point sources at the Dam and Reservoir require an individual control strategy [ICS] under Section 304(l) to control those toxic pollutants." EPA letter brief at 2 (filed April 6, 1992). In its September 28, 1990 decision, EPA announced that it would issue an ICS by March 31, 1991, and that the permit would require compliance with effluent limits, "based on State water quality standards, for copper and zinc as soon as possible but not later than three years from the date on which the discharger has actual or constructive notice of the individual control strategy, e.g., a draft permit is sent to the discharger." Plaintiff's Ex. 5 in supp. of SJ against EBMUD at 18. An ICS could be in the form of an NPDES permit. EPA letter brief at 2 (citing 40 C.F.R. § 123.46(c)).[17]

In its September 1990 listing decision and the accompanying response to comments from EBMUD, EPA articulated its basis for characterizing the discharge points at the Mine Run Dam and Reservoir as point sources within the meaning of the Act. Plaintiff's Ex. 6 in supp. of SJ against EBMUD at 4. On December 12, 1990, EBMUD filed a petition for reconsideration of EPA's decision that EBMUD has the duty to apply for an NPDES permit. *See* EBMUD's Ex. 14 in opp'n to SJ. In addition, the State Board advised EPA by letter dated May 1, 1991, that it did

---

[17] Section 123.46(c) requires that an ICS be in the form of a draft or final NPDES permit without supporting documentation showing that the effluent limits are sufficient to meet the applicable water quality standards.

not consider Mine Run Dam and Reservoir to be a point source within the meaning of the Act. *Id.* Ex. 12. Because EPA has not yet ruled on EBMUD's application for reconsideration, EPA "has not yet made a final ruling that the discharge points at the Dam and Reservoir are point sources subject to the [Act], which will occur if and when EPA promulgates an ICS for EBMUD." EPA letter brief at 2. EPA advises that it "is continuing to move forward to develop an ICS for EBMUD." *Id.*

EPA "has met on several occasions with EBMUD, the State.Board and the Committee regarding the appropriate controls for the discharge points at the Dam and Reservoir," and EPA has provided the parties with drafts of an EPA Administrative Order ("AO") on consent. *Id.* EPA "contemplates at this time that the draft AO would, if issued, represent the ICS for those point sources at the Dam and Reservoir under Section 304(l) and would contain EPA's response to EBMUD's Petition." *Id.* (footnote omitted). EPA does not believe that the issuance of an ICS, or a decision that no ICS is necessary because there are no point sources at the Dam and Reservoir, is imminent. *Id.* at 3.

2. The Doctrine of Primary Jurisdiction

Primary jurisdiction is a "flexible concept concerned with promoting proper relationships between the courts and administrative agencies" and it is premised on the "desire for uniformity of regulation and the need for initial consideration by a body possessing special expertise in the issue presented." *Board of Education of City School Dist. of City of New York v. Harris*, 622 F.2d 599, 606

(2d Cir. 1979), *cert. denied*, 449 U.S. 1124 (1981) (citations omitted). As the Supreme Court has explained,

> "Primary jurisdiction" . . . comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

United States v. Western Pac. R.R. Co., 352 U.S. 59, 63-64 (1956) (citations omitted).

EPA's position is that the pendency of the section 304(l) proceeding does not divest this court of jurisdiction to adjudicate the Committee's citizen suit under the Clean Water Act. EPA letter brief at 3. It concludes that the court has jurisdiction to "make the threshold determination whether the discharge points at the Dam and Reservoir are point sources subject to CWA regulation." *Id.* EPA also opines that a stay or dismissal of this case as a prudential matter under the doctrine of primary jurisdiction is not appropriate, because deference would delay adjudication of issues raised in the Committee's citizen suit that would not be addressed by EPA in the second 304(l) administrative process. As an example, the EPA notes that the Committee seeks a remedial plan to remove and dispose of contaminated sediments in the Camanche Reservoir, relief that EPA says an ICS issued by EPA is unlikely to provide. *Id.*

In addition to EPA's views, I also note that precedent weighs heavily against the defendants' position. Every

district court presented with a primary jurisdiction argument in a case involving a Clean Water Act ("CWA") citizen suit have rejected the suggestion that they defer to either state or federal regulatory agencies. *See, e.g., National Wildlife Fed'n v. Consumers Power Co.*, 657 F. Supp. 989, 995 (W.D. Mich. 1987), *rev'd on other grounds*, 862 F.2d 580 (6th Cir. 1988) (while district court was "tempted to invoke the primary jurisdiction doctrine," it was unable to defer to the EPA, FERC or the state agency noting that "[w]hether the CWA covers the discharge at issue in this case is a question of statutory interpretation that does not necessarily fall within the special competence of these agencies"); *O'Leary v. Moyer's Landfill, Inc.*, 523 F. Supp. 642, 647 (E.D. Pa. 1981); *Student Public Interest Research Group of New Jersey, Inc. v. Fritzsche, Dodge & Olcott, Inc.*, 579 F. Supp. 1528, 1537 (D.N.J. 1984), *aff'd*, 759 F.2d 1131 (3d Cir. 1985) (declining to stay case pending EPA's consideration of defendant's permit renewal application). *See also Natural Resources Defense Council, Inc. v. Outboard Marine Corp.*, 692 F. Supp. 801, 809-10 (N.D. Ill. 1988) (declining to stay case pending defendant's appeal before state agency of terms of permit and denial of modification to earlier permit); *Connecticut Fund for the Env't v. Job Plating Co., Inc.*, 623 F. Supp. 207, 214-15 (D. Conn. 1985) (same); *Student Public Interest Research Group of New Jersey, Inc. v. Monsanto Co.*, 600 F. Supp. 1479, 1483-84 (D. N.J. 1985) (declining to stay case pending EPA's consideration of defendant's request for retroactive modification of permit; issue under consideration by EPA for 7 years).

Defendants rely primarily upon *Montgomery Envtl. Coalition Citizens Coordinating Comm. on Friendship Heights v. Washington Suburban Sanitary Comm'n*, 607 F.2d 378, 379

(D.C. Cir. 1979), to support their primary jurisdiction argument. That reliance is misplaced. In *Montgomery*, the EPA proceeding concerned the contents of an NPDES permit, "an issue that clearly implicates the special expertise and competence of the EPA -- and not whether a permit should be issued in the first place." *Consumers Power*, 657 F. Supp. at 1001; *see also Connecticut Fund*, 623 F. Supp. at 215 (distinguishing *Montgomery* on ground that permit in that case had not yet been issued; in case before court, permit had been issued and plaintiffs sought only its enforcement). Here, plaintiff asks the court to determine whether defendants are obligated to obtain a permit, i.e., whether defendants are discharging pollutants from a point source in violation of the Act. While the terms of an NPDES permit may be within the special competence of EPA, *Fritzsche*, 579 F. Supp. at 1537, whether the facility includes a point source through which pollutants are discharged without a permit is an issue within the competence of the courts. *See Legal Envtl. Assistance Found., Inc. v. Hodel*, 586 F. Supp. 1163, 1169 (E.D. Tenn. 1984).

The Clean Water Act expressly provides this court with jurisdiction over the issues presented in this citizen suit, i.e., whether defendants are discharging pollutants from a point source into navigable waters without a permit. Deferring to the EPA proceeding on the basis of primary jurisdiction in this case would undermine the citizen suit provision of the Act as the primary enforcement mechanism for water pollution regulation. *See Moyer's Landfill*, 523 F. Supp. at 647. As has been observed, given Congress' judgment, the "doctrine of primary jurisdiction should be invoked sparingly where

it would serve to preempt a citizen's suit." *Fritzsche*, 579 F. Supp. at 1537.

Under the circumstances, deference to EPA is inappropriate and the court declines to invoke the doctrine of primary jurisdiction.

E. Failure to State a Claim

Defendants urge that plaintiff's complaint fails to state a claim under the Clean Water Act because the State has determined that defendants are not required to apply for an NPDES permit for Mine Run Dam and Reservoir. They argue that since no permit is required, there can be no violation of the Act. This argument is a variation of the assertion that only the state courts have jurisdiction to consider plaintiff's claim, and must be rejected for the same reasons discussed above concerning subject matter jurisdiction. *See McClellan Ecological Seepage Situation (MESS) v. Weinberger*, 707 F. Supp. 1182, 1200 n.9 (E.D. Cal. 1988) (plaintiff may maintain citizen suit where allegation is that discharge of a pollutant is occurring without an NPDES permit).

The defendants also assert that the complaint fails to state a claim because plaintiff fails to allege the existence of any ongoing violations of the Act, or a reasonable likelihood of continuing violations of the Act. To invoke jurisdiction under the Act, plaintiff is required to make a good faith allegation of continuous or intermittent violations of the Act in its complaint. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57 (1987); *Atlantic States Legal Found., Inc. v. Tyson Foods, Inc.*, 897

F.2d 1128, 1131 (11th Cir. 1990). The Committee's complaint includes the allegations necessary to state a claim. *See* Complaint ¶¶ 26, 29, 30, 44.

For all the foregoing reasons, defendants' motions to dismiss plaintiff's claims are DENIED.

III

PLAINTIFF'S MOTIONS FOR PARTIAL SUMMARY JUDGMENT

Plaintiff moves for partial summary judgment seeking to establish both defendants' liability under the Clean Water Act for the discharge of pollutants from the Mine Run Dam and Reservoir into the Mokelumne River and Camanche Reservoir.[18] To establish liability under the Act, plaintiff bears the burden of showing that the defendants are (1) discharging a pollutant (2) into navigable waters (3) from a point source (4) without a permit. 33 U.S.C. § 1342.

Plaintiff asserts that the Penn Mine facility is a contained treatment system which discharges pollutants to navigable waters of the United States through point sources when EBMUD and the RWQCB release effluent from Mine Run Dam through the discharge valve or spillway into the Mokelumne River in violation of 33

---

[18] Plaintiff incorporates its arguments and supporting evidence used in its motion for partial summary judgment against EBMUD in support of its motion for partial summary judgment against the RWQCB. Plaintiff's memo in support of SJ against RWQCB at 3.

U.S.C. § 1365(a)(1). I turn to an examination of the facts and law pertinent to this claim.[19]

There is no dispute that the Mokelumne River and the reservoir are navigable waters of the United States. Thus, if there are discharges into the river and reservoir the second element of plaintiff's burden has been satisfied. Moreover, there is no dispute that neither EBMUD nor the RWQCB possesses a license to discharge. Thus, unless a license is otherwise excused, the fourth element is satisfied. Defendants deny, however, that they are discharging pollutants and that any discharge occurs from a point source. Moreover, the RWQCB contends that the statute's licensing provisions do not apply to the RWQCB.

A. Defendants are Discharging a Pollutant

1. Pollutants

Although the Mine Run Dam itself is constructed of nonreactive materials, there is no serious dispute that pollutants are "added" to the leachate contained in the Mine Run Dam Reservoir from an outside source through the runoff from EBMUD's property into the Reservoir. EBMUD Answer ¶ 22 ("Admits that some acid mine drainage from the New Penn Mines site apparently flows into Hinkley Run and Mine Run creeks and then into

---

[19] Like the standards under Fed. R. Civ. P. 12(b)(6), those governing disposition of motions under Fed. R. Civ. P. 56 are equally well established, *see, e.g., Mid Valley Bank v. North Valley Bank*, 764 F. Supp. 1377, 1380-81 (E.D. Cal. 1991), and no useful purpose would be served by reiterating them here.

Mine Run Dam Reservoir"); *see also* RWQCB Answer ¶¶ 18, 22; Davy Report at 2-88, 3-3; Jennings supp. decl., in supp. of SJ against EBMUD ¶¶ 3, 4 (precipitation and runoff hit EBMUD property and drain through numerous fissures, ditches and erosion channels down the banks of Mine Run Dam Reservoir); Sullivan Aff. in supp. of RWQCB's opp'n to SJ ¶¶ 8, 11 (acknowledges that "substantial quantities of already reacted materials [are] available at the other site locations for transportation down the creek drainages. . . . It can be concluded that AMD/ARD has formed primarily in the waste rock piles and has or will be transported into the Mine Run Creek and Hinkley Creek drainages via rainwater runoff and shallow ground water.")[20]

---

[20] Plaintiff presents ample evidence that pollutants are also "added" to the leachate contained in the Mine Run Dam Reservoir from the facility's circulation and pooling system. Maest supp. decl., Plaintiff's Ex. 4 in reply in supp. of SJ against EBMUD; Jennings supp. decl., plaintiff's Ex. 3 in supp. of SJ against EBMUD ¶¶ 3, 4. Maest supp. decl. ¶ 3; *see also* ¶¶ 6, 13, 19 (Because the banks and sides of the reservoir are constructed of reactive waste rock materials from the mine site, the precipitation and runoff flowing over those reactive materials forms acid mine drainage). Nonetheless, I cannot say that there is no disputed issue of fact relative to this question as to the RWQCB. *See, e.g.*, Pinkos Aff. ¶¶ 12, 18 (questions data and conclusions of Bond Report); Howard Aff. ¶ 21; Sullivan Aff. ¶ 5 ("the impoundment of water containing acid mind drainage (AMD) or acid rock drainage (ARD) . . . does not currently enhance the production of AMD/ARD"). While this material often appears to be self-contradictory and when read closely often appears to support plaintiff's contentions, I cannot resolve this dispute under the standards applicable to motions made pursuant to Fed. R. Civ. P. 56. My inability to resolve this factual issue, however, does not preclude summary judgment given the undisputed facts cited in the text.

2. Lack of Ownership

Defendants contend that they do not own and are not responsible for the construction, operation or maintenance of any structure at the Penn Mine site other than the Mine Run Dam and pump. The RWQCB also argues that its obligation to obtain an NPDES permit is conditioned upon the RWQCB being an owner or operator of the impoundments and diversion structures at the Penn Mine facility.[21] The RWQCB argues that it cannot be held liable for Penn Mine discharges when it merely "installed a pipe." RWQCB opp'n to plaintiff's motion for SJ at 25 (citing *Friends of Sakonnet v. Dutra*, 738 F. Supp. 623, 632-33 (D.R.I. 1990)). These arguments are without merit.

The Clean Water Act provides that absent a permit, "the discharge of any pollutant by any person[22] shall be

---

[21] The RWQCB cites the *Gorsuch* court's analysis of *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1377 (4th Cir. 1976), to support its position that EPA cannot order a polluter to remove pre-existing pollution for which that polluter had no responsibility. RWQCB opp'n to SJ at 7, n.8, *citing National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 174-75 n.57 (D.C. Cir. 1982). *Appalachian Power* is inapposite to the facts in this case because *Appalachian Power* dealt with nonpoint sources of pollution. *Appalachian Power Co.*, 545 F.2d at 1373. In contrast, as I explain *infra*, the Penn Mine facility is a point source subject to regulation under the Clean Water Act.

[22] The statute defines "person" to include states, 33 U.S.C. § 1362(5), and the regulations provide that "person" for the purpose of discharging a pollutant without an NPDES permits [sic] includes "an individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof." 40 C.F.R. § 122.2. The RWQCB members as State of California employees, RWQCB Answer ¶¶ 1, 10, fall within these definitions of "persons."

unlawful." 33 U.S.C. § 1311(a). The Act makes such "persons" strictly liable for their unlawful discharge of pollutants into navigable waters. *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 374 (10th Cir. 1979); *Proffitt v. Municipal Auth. of Borough of Morrisville*, 716 F. Supp. 845, 853 (E.D. Pa. 1989), *aff'd*, 897 F.2d 523 (3d Cir. 1990); *American Petroleum Inst. v. EPA*, 661 F.2d 340, 343 (5th Cir. 1981). Put another way, there is no need to prove a discharge was intentional, knowing or negligent under the Clean Water Act. *Earth Sciences*, 599 F.2d at 374; *Sierra Club v. Abston Constr. Co., Inc.*, 620 F.2d 41, 45-46 (5th Cir. 1980).

Moreover, ownership is not a prerequisite to liability.[23] 33 U.S.C. §§ 1342, 1362(14); 40 C.F.R. 122.2(b); *Dague v. City of Burlington*, 935 F.2d 1343, 1355 (2d Cir. 1991) (the fact that defendant discharges pollutants through conveyance owned by another party is irrelevant); *Earth Sciences*, 599 F.2d at 374 (defendant liable for the discharge of pollutants into navigable waters without a permit). As EPA notes:

> NPDES permits routinely regulate point sources . . . which discharge pollutants originally generated on property owned by persons other than the permit holder. *See* 40 C.F.R. 133, regarding publicly owned treatment works; and 40 C.F.R. 122.26 regarding storm water discharges.

---

[23] The Clean Water Act does not define "owner" or "operator" in the context of the NPDES permit requirements and who may be liable as a discharger. *Cf.* 33 U.S.C. § 1316 (definition of "owner" and "operator" in the context of "National standards of performance").

EPA Response to Comments, Ex. 6 to plaintiff's motion to SJ against EBMUD at 4-5.

Because ownership is not a prerequisite to liability which is imposed without fault, the fact that leachate or acid mine drainage may originate above the Penn Mine facility and then flow into the Mine Run Dam and Reservoir through the impoundment and circulation system does not relieve EBMUD or the RWQCB of liability for their subsequent discharges. 33 U.S.C. § 1362(14) ("discharge of a pollutant" includes "additions of pollutants into waters of the United States from: surface runoff which is collected or channeled [sic] by man"); 40 C.F.R. 122.2(a) & (b) ("discharge of a pollutant" includes "discharges through pipes, sewers, or other conveyances owned by a State"); *Abston*, 620 F.2d at 44-45; *Earth Sciences*, 599 F.2d at 374; *Moyer's Landfill*, 523 F. Supp. at 655.

Under the standards articulated above, all that is required to establish liability is proof that the discharge occurred and that a given defendant was a legal cause of the discharge. The causation requirement can be met because of a defendant's "control over discharges," *Friends of Sakonnet*, 738 F. Supp. at 629; because of a defendant's actions as an operator, *Moyer's Landfill*, 523 F. Supp. at 655; because of a defendant's responsibility for discharges, *Earth Sciences*, 599 F.2d at 374; or because of a defendant's actions intended to "change the surface, to direct the waterflow or otherwise impede its progress," *Abston*, 620 F.2d at 45. Here, the RWQCB's "control," "authority," and "affirmative actions" over discharges at the Penn Mine facility provide a sufficient nexus between the RWQCB and discharges at the facility to support a

finding that the RWQCB is liable under the Clean Water Act.

It is clear that the RWQCB jointly constructed the facility with EBMUD in 1978. EBMUD Answer at 3; RWQCB Answer ¶¶ 16, 18, 20; Davy Report at 1. This construction work was undertaken pursuant to the March 29, 1978 Resolution No. 78-55, which describes the construction of the Penn Mine Facility as a "joint undertaking between the Board and EBMUD". Resolution No. 78-55, Ex. 2 to plaintiff's motion for SJ ¶ 7. Moreover, the RWQCB purchased the pump and pipe that recirculate water from the Mine Run Dam Reservoir into impoundments located upstream from the Mine Run Dam Reservoir on Mine Run Creek. RWQCB Answer ¶ 19. Nor did the RWQCB's activities end with construction. It pays for the pump's repair and replacement and pays for the electricity to operate the pump. Lee Aff. in supp. of RWQCB's opp'n to SJ ¶ 4. This pump and pipe recirculation system is a key component of the Penn Mine facility.[24] Moreover, the RWQCB periodically applies for and is granted land use permits for the continued housing and operation of the pump on EBMUD property.[25] These facts demonstrate the RWQCB's intimate relationship with, and control over, the facility and its discharges.

---

[24] Linville Aff., in support of EBMUD's opp'n to plaintiff's motion for SJ ¶¶ 33, 34; Maest Aff., in support of plaintiff's motion for SJ at 4.

[25] *See* October 10, 1991 letter from EBMUD to RWQCB and attached document entitled "Limited Land Use Permit P-319" attached as Ex. 2 to Helfrich Decl. in support of motion for SJ against RWQCB.

Nor is this the only evidence that the RWQCB is a discharger. The 1979 MOU[26] entered into between the defendants provides that "[t]he quantity and timing of planned releases will be subject to mutual agreement by the parties to this Memorandum of Understanding." MOU at 2.[27] The record shows that the RWQCB has

---

[26] The Norton affidavit explains the RWQCB's policy of using MOUs and Management Agency Agreements ("MAAs") to regulate public agencies who are dischargers instead of regulating them by means of waste discharge permits. Norton Aff. at 9. Other examples of MOU's [sic] offered by the RWQCB suggest, however, that the RWQCB's control over the discharge of pollutants at the Penn Mine facility without an NPDES permit is, in fact, unusual, if not unique. *Cf.* Aff. of Norton, in support of the RWQCB's opp'n to SJ and Exs. B, C and D. Even if the Norton affidavit is accepted as true, the RWQCB cites no authority that the RWQCB's decision to enter into an MOU or MAA in lieu of issuing an NPDES permit is permissible under the Clean Water Act. Nor does the existence of an MOU or MAA insulate the RWQCB from liability for its own violations of the Clean Water Act. The Norton exhibits themselves show that MOUs and MAAs are to be used to effectuate the requirements of state law and the Clean Water Act, *see, e.g.*, Norton Aff. Ex. B at 1 and Ex. C at 1, not as a means to circumvent them. Finally, to the extent that these facts are suggestive that the Board seeks immunity because it is a governmental agency regulating the discharges, that matter is discussed at length in the text, *infra*.

[27] The court need not determine whether the MOU is a binding contract, as alleged by the plaintiff, or whether the MOU is "merely a memorialization of regulatory roles," as alleged by the RWQCB. RWQCB opp'n to plaintiff's motion for SJ at 37; Norton Aff. ¶ 16. Whatever its status, the MOU evidences long-term control over discharge decisions by the RWQCB. Moreover, the MOU is only one of many factors on which the RWQCB's liability at the Penn Mine facility is premised.

initiated requests to discharge into the Camanche Reservoir,[28] and has consulted in each controlled release. Linville Aff., in support of RWQCB's opp'n to SJ ¶¶ 31, 32. The Board's veto power of decisions concerning releases is clear. Thus, on December 21, 1990, EBMUD directed a letter to the RWQCB acknowledging that "[a]s in past years, if either the Regional Board or DF&G do not agree that an action is needed or appropriate [at the Penn Mine facility], no action will be taken." Helfrich Aff., Ex. E in supp. of plaintiff's mot. for SJ; *see also* Helfrich Aff., Ex. G (memorandum from RWQCB Area Engineer, Ted Fenner, to RWQCB Supervising Engineer, Jack Del Conte, describing MOU signatories' agreement to conduct a controlled discharge).

Finally, the RWQCB's comparison of its actions with the *Friends of Sakonnet* town's limited role of making one-time emergency repairs to and installing a discharge sewage outfall pipe cannot be credited. *Friends of Sakonnet*, 738 F. Supp. at 631. The MOU specifically notes that

> The Board and District jointly undertook the engineering work required for the works to divert uncontaminated runoff around and away from contaminated areas of the mine. The Board undertook work required to construct the various works located above and on the mine site

---

[28] In a March 6, 1980 memorandum from D.A. Wilson of EBMUD to G.L. Laverty of EBMUD, Mr. Wilson notes that "Ted Finner of the Regional Water Quality Control Board . . . contacted Harry Rectenwald of Department of Fish and Game, Region II, *to request permission to make releases* from Mine Run Reservoir to Camanche Reservoir." Helfrich Aff., Ex. F. in support of motion for SJ.

> to divert the uncontaminated runoff around and away from the mine, including diversion channels, evaporation ponds, and related work.

MOU at 1. According to the MOU, by March 23, 1979, the date the MOU was signed, the work "[had] been essentially completed by the Board and the District." *Id.*

3. Governmental Status of the RWQCB

The RWQCB also asserts that as an arm of the state it is not liable for its past conduct under the Eleventh Amendment to the Constitution of the United States and that under the Act, it cannot be held liable for its regulatory conduct. I consider each claim below.

a. Eleventh Amendment

The RWQCB argues that the construction of impoundments and diversion structures in 1978 cannot be considered by this court as evidence that the RWQCB is an operator today because of Eleventh Amendment immunity for these past occurrences. The argument does not lie both as a matter of fact and as a matter of law.

The argument is premised on the notion that the lack of authority to award monetary damages because of past conduct precludes consideration of that conduct relative to future violations of law. No such rule exists, and it is clear that insofar as future conduct is subject to regulation by this court, the RWQCB's past conduct is relevant and competent evidence. *Ex Parte Young*, 209 U.S. 123, 155-56 (1908). Put another way, this defendant's construction efforts are not simply past occurrences but evidence

of continuing violations of the Clean Water Act. The RWQCB collected and channeled the surface waters at the site and constructed conveyances and point sources of pollution at the facility which the RWQCB knew would result in ongoing discharges of pollutants into navigable waters.[29] The RWQCB admits such discharges have occurred periodically, RWQCB Answer ¶ 21, and that the RWQCB participated in the mutual decision to release impounded waters. MOU at 2.

Even if it were not clear that the RWQCB's position must fail as an evidentiary matter, it fails for an even more direct reason. Suits under the Clean Water Act are authorized by virtue of the Commerce Clause of the federal Constitution. *See, e.g., Hodel v. Virginia Surface Mining & Reclamation Ass'n.*, 452 U.S. 264, 282-83 (1981); *Leslie Salt Co. v. Froehlke*, 578 F.2d 742, 755 (9th Cir. 1978). The Supreme Court has held that Congress may abrogate a state's Eleventh Amendment immunity from suit in federal court when acting pursuant to the Commerce Clause. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 14 (1989) (plurality opinion). The High Court only requires that Congress' intent to do so must be "unmistakably clear in the language of the statute." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985); *Green v. Mansour*, 474 U.S. 64, 67-68 (1985) ("states may not be sued in federal court . . . unless Congress, pursuant to a valid exercise of power, unequivocally expresses its intent to abrogate the

---

[29] The MOU explicitly declares that "[t]he parties [to the MOU] recognize that releases of waters from the impoundment reservoir into Camanche Reservoir will occur periodically." MOU at 1.

immunity"). The Clean Water Act's definition of "person," 33 U.S.C. § 1362(5), and the regulation providing that the state is a "person" subject to the Act, 40 C.F.R. § 122.2, clearly demonstrate that Congress intended to impose liability upon the states for their violations of the Act. *See, e.g., Union Gas Co.*, 491 U.S. at 11-12 (inclusion of state within the definition of "persons" is an indication of Congressional intent to subject states to CERCLA liability under citizen suit provision). For these reasons, the Board's Eleventh Amendment argument fails.

b. Regulatory Conduct

In the alternative, the RWQCB contends that it is not liable for discharges from the facility because the conduct complained of was undertaken pursuant to its regulatory authority and was the direct outgrowth of an enforcement action against EBMUD. RWQCB opp'n to SJ at 27; Del Conte Aff., ¶¶ 10-17; Cal. Water Code, §§ 13260-73.[30] I cannot agree.

State government officials have generally not been held responsible for pollution alleged to have been caused by a failure to enforce the requirements of the Clean Water Act. *See, e.g., Ringbolt Farms Homeowners Ass'n v. Town of Hull*, 714 F. Supp. 1246, 1256 (D. Mass. 1989) (no cause of action against the states for any

---

[30] In the event a responsible person fails to cleanup or abate pollution discharged into waters of California in violation of waste discharge requirements, the RWQCB is authorized to perform cleanup, abatement or remedial work required under the circumstances. Cal. Water Code § 13260-13273, 13304.

improper administration of their regulatory duties or for any failure to enforce the provisions of the Clean Water Act against polluters); *Love v. New York State Dep't of Environ. Conserv.*, 529 F. Supp. 832, 840 (S.D.N.Y. 1981) (CWA does not impose liability on local government officials for failing to issue orders to stop ongoing pollution by a third party); *Moyer's Landfill*, 523 F. Supp. at 648 (regulatory agency that decides against enforcement is not responsible for discharges under the Act). On the other hand, as the RWQCB concedes, an allegation that the state itself violated effluent standards would provide citizen suit jurisdiction. RWQCB opp'n to SJ at 27.[31] The Board attempts to distinguish such cases from one where the state's violation of the Clean Water Act was caused by "remedial actions to abate another's pollution taken pursuant to a state's regulatory functions. . . . " *Id.* The Regional Board acknowledges that it found no cases that specifically address this issue. *Id.* The fact that nothing in the statute remotely supports its position suffices to dispose of the Board's contention.

The Board points to those cases where a state agency has become an owner or operator of hazardous waste

---

[31] "The Regional Board does not dispute that when a state agency is acting pursuant to proprietary functions, eg. (sic) owner/operator of prison with its own sewage treatment facility, it is subject to Clean Water Act requirements for discharges of pollution into navigable waters." Opp'n at 27, n.21. *See, e.g., Montgomery Envtl. Coalition v. Fri*, 366 F. Supp. 261, 267 (D.D.C. 1973) (state officials can be liable for failure to enforce the Act and where officials control the discharge of pollutants); *Ringbolt Farms Homeowners Ass'n*, 714 F. Supp. at 1256 (the Act does provide relief against a state "to the extent that the state is an actual discharger of pollutants in violation of the Act").

sites because of its regulatory activities, making it a potentially responsible party under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. §§ 9601-75. RWQCB opp'n to SJ at 27. It argues that here, as in such cases, the main focus should be on whether the agency has functioned more like a regulatory body or more like a private party. The argument cannot prevail.

The absence of CERCLA liability in cases cited by the Board is the result of a specific congressional judgment. *See* 42 U.S.C. § 9607(a)(1) and (2)) [sic], 42 U.S.C. § 9601.[32] No such statutory exemption is provided governmental agencies under the Clean Water Act.

Moreover, even if something in the Act supported RWQCB's contention, the factual premise is faulty. Although it may be that the Board's initial involvement at

---

[32] 42 U.S.C. § 9601(20)(D) specifically excludes from CERCLA liability a state acquiring title to contaminated property "by virtue of its function as a sovereign," except where the state "has caused or contributed to the release or threatened release of a hazardous substance from the facility." 42 U.S.C. § 9601(20)(D). CERCLA also contains a specific exemption for persons engaged in cleanup activities and agencies responding to emergencies concerning actual or potential releases. 42 U.S.C. § 9607(d). Finally, contrary to the RWQCB's understanding of the CERCLA cases, courts have held regulatory agencies can be liable under CERCLA where the agency exercises control over the polluting activity. *See, e.g., United States v. Stringfellow*, 31 ERC 1315 (C.D. Cal. 1990) (State of California liable because of activities including control of waste disposal and participation in opening and closing the site); *United States v. New Castle County*, 727 F. Supp. 854, 866-67 (D. Del. 1989) (list of factors on which state liability might be premised).

Penn Mine was in a regulatory capacity, as noted above, the record conclusively demonstrates that it presently does more than regulate -- it controls the discharge of pollutants. It jointly constructed the facility, purchased the pump, finances pump operating costs, and controls discharges of pollutants. These factors demonstrate that the RWQCB is presently a discharger in its own right rather than a passive agency bystander and is liable for the discharges. *Friends of Sakonnet*, 738 F. Supp. at 629.

For all of the above reasons, I conclude that there is no material issue of fact concerning either defendant's discharging of pollutants, and thus plaintiff has satisfied the third element of its cause of action. I now turn to the last element, the discharge through a point source.

B. The Facility is a Contained Leachate Collection and Treatment System Which Releases Acid Mine Drainage from Point Sources

A "point source" is defined under the Act as

> any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agricultures.

33 U.S.C. § 1362(14). Plaintiff argues that the discharge valve and spillway on Mine Run Dam are point sources because they are "discernable, confined and discrete" conveyances from which pollutants may be discharged.

That position appears well taken. *See National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 165 n.22 (D.C. Cir. 1982) ("the pipes or spillways through which water flows from the reservoir through the dam into the downstream river clearly fall within [the point source] definition").

I begin by noting that on September 28, 1990, EPA concluded that Mine Run Dam and Reservoir includes point sources which must be regulated under 33 U.S.C. § 1314(l)1)(C) [sic].[33] *See* plaintiff's Ex. 5 in support of SJ against EBMUD; *see also* EPA's Response to Comments and Petitions Regarding Listing Decisions for California Waters Under Section 304(l) of the Clean Water Act at 1, plaintiff's Ex. 6 in support of SJ against EBMUD ("EPA response").[34] Underlying this conclusion is EPA's determination that the facility is a leachate collection system which discharges or adds pollutants to navigable waters from point sources when acid mine drainage is released from the Mine Run Dam's spillway or discharge valve into the Mokelumne River and Camanche Reservoir.[35]

---

[33] I note that because the historical facts are not in dispute, this is a question of interpretation of law not simply a factual dispute as argued by the RWQCB.

[34] The court grants plaintiff's request that the court take judicial notice of the fact of EPA's decision and response, pursuant to Fed. R. Civ. P. 201.

[35] EPA's analysis is that: "EBMUD is the owner and operator of a point source through which EBMUD discharges pollutants. Notwithstanding that it may result from such natural phenomena as rainfall and gravity, the surface runoff of contaminated waters, once channeled or collected, constitutes discharge by a point source. . . . The Mine Run Dam and Mine Run Dam Reservoir is a leachate collection system. When the leachate collection system fails because of flaws in the construction or

EPA's construction of the Clean Water Act is entitled to substantial deference. *See Gorsuch*, 693 F.2d at 166-70; *Rybachek v. U.S. EPA*, 904 F.2d 1276, 1284-85 (9th Cir. 1990). Defendants, however, contend that for various reasons EPA's conclusion should not be viewed as dispositive.

Defendants first argue that deference is inappropriate since EPA's determination that Mine Run Dam and Reservoir is a leachate collection system, as opposed to a traditional dam which merely impounds navigable waters, is inconsistent with prior EPA interpretations of the Act. Assuming that defendants' characterization of the history of EPA's decisions is correct, under recent pronouncement of the Supreme Court, the decision is nonetheless entitled to deference. *See Rust v. Sullivan*, 111 S. Ct. 1759, 1768-1769 (1991) (where plain language and legislative history of statute are ambiguous, agency's revised interpretation of statute is entitled to substantial deference if change is justified by "reasoned analysis").

In the alternative, the RWQCB argues that if the court defers to any administrative agency's factual determinations concerning the facility, that deference should be to

---

inadequate size to handle the fluids used, with resulting discharge, whether from a fissure in the dirt berm or overflow of a wall, the escape of liquid from the confined system is from a point source. . . . The discharges here resulting from (1) "controlled releases" through the discharge valve at the north end, and (2) "uncontrolled releases" such as overflows of the Mine Run Dam Reservoir, constitute point source discharges." EPA Response at 4 (citations omitted).

the RWQCB and not to EPA. RWQCB opp'n to SJ at 9.[36] It is true that the Clean Water Act allocates to the States the primary responsibility for administering the Act with EPA having oversight authority and enforcement powers. *Shell Oil Co. v. Train,* 585 F.2d 408, 410 (9th Cir. 1978) (Congress clearly intended that the states would eventually assume the major role in the operation of the NPDES program). Nonetheless, consistent with its authority to do so, the EPA explicitly disapproved the RWQCB's control strategy for the Penn Mine facility and assumed permitting authority over the facility under 40 C.F.R. Part 123.46(f);[37] *see Cleveland Elec. Illuminating Co. v. EPA,* 603

---

[36] The RWQCB asserts that its determination that the Mine Run Dam is not a point source is based on greater knowledge of the site than that of EPA's staff. RWQCB amended opp'n to plaintiff's motion for SJ at 10 ("EPA's preliminary determination that the dam is a point source . . . was based only a few documents placed in a huge administrative records (sic) and *no* independent investigation or analysis of any sort."). The RWQCB offers no evidence to support this assertion, nor any authority that its asserted superior knowledge provides it with a right to greater deference as a legal matter. The legal scheme governing the relationship between the agencies makes the EPA the final authority by virtue of its power to assume permitting authority. *See* 40 C.F.R. Pt. 123.46(f). The degree of deference to administrative expertise required to be given by the courts rests on legal rather than factual determination. *See Bell v. Wolfish,* 441 U.S. 520, 548 (1979) ("We further observe that on occasion prison administrators may be 'experts' only by Act of Congress or of a State legislature.").

[37] EPA has asserted its authority finding that "EPA disapproves the individual control strategy for Mine Run Dam/Mine Run Dam Reservoir because one has not been submitted. Under regulations at 40 CFR Part 123.46(f), EPA is assuming permitting authority for this facility. . . . " EPA 304(1) Decision, plaintiff's Ex. 5 in supp. of mot. for SJ against EBMUD at 18.

F.2d 1, 6 (6th Cir. 1979) (EPA's only duty in disapproving state permitting decision is to consider the findings of the initiating agency). Under these circumstances, it seems relatively clear that the appropriate agency enjoying deference is the EPA.

There is, however, another and more convincing basis for limiting deference being accorded EPA's conclusion. As I noted above, EPA has not yet responded to EBMUD's petition for reconsideration of its determination that Mine Run Dam is subject to regulation under the Clean Water Act. Because EPA's initial conclusion is subject to reconsideration, the persuasive effect of the decision is diminished. Nonetheless, I find that EPA's conclusion that the Mine Run Dam and Reservoir includes point sources discharging pollutants both reasoned and correct.

The Clean Water Act governs the discharge of pollutants from a confined leachate[38] treatment system. *See, e.g., Earth Sciences,* 599 F.2d at 374 (Clean Water Act applies to a mining operation which collects leachate in a closed circulating system meant to isolate the leachate). The court explained that when the system

> fails because of flaws in the construction or inadequate size to handle the fluids utilized, with resulting discharge, whether from a fissure in the dirt berm or overflow of a wall, the escape of liquid from the confined system is from a point source. Although the source of the

---

[38] Leachate is liquid, originally rain or groundwater, that has passed through some toxic substance and thus is contaminated. *See, e.g., Moyer's Landfill,* 523 F. Supp. at 651 n.18.

> excess liquid is rainfall or snow melt, this is not the kind of general runoff considered to be from nonpoint sources under the [Act].

Id.

Similarly, in *Moyer's Landfill*, 523 F. Supp. at 655, the court concluded that leaks from a landfill leachate circulating collection and treatment system, emanating from overflowing ponds, collection-tank bypasses, collection-tank cracks and defects, gullies, trenches, ditches, and broken dirt berms were point source discharges in violation of the Act. The court explained that "[n]otwithstanding that [discharges] may result from such natural phenomena as rainfall and gravity, the surface run-off of contaminated waters, once channeled or collected, constitutes discharge by a point source." *Id.; accord Abston*, 620 F.2d at 45-46.

The facts here demonstrate that the Penn Mine facility is a contained leachate collection and treatment system, like that in *Earth Sciences* and *Moyer's Landfill*. The Penn Mine facility was designed to capture contaminated surface water flowing through the site, to contain and evaporate the leachate through a ponding and recirculation system, and to release acid mine drainage and polluted runoff from the Mine Run Dam and Reservoir through the spillway and discharge valve into the Mokelumne River and Camanche Reservoir. *See* Bond Report; RWQCB's statement of uncontroverted material facts ¶¶ 32, 33; Supp. Jennings Decl. in supp. of SJ against EBMUD ¶¶ 3-5, Attachments A, B.

Both defendants admit that the facility is designed to release impounded acid mine drainage into the Camanche Reservoir and Mokelumne River through the controlled discharge valve and the spillway. EBMUD Answer ¶ 21; RWQCB Answer ¶ 21. Both defendants admit such releases have occurred in the past. EBMUD Answer ¶ 21; RWQCB ¶ 21. Nonetheless, the defendants argue that the facility is not a "point source" because, as a general matter, the mere passage of polluted waters through a dam that impounds navigable waters does not give rise to a permit requirement. *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1377 (4th Cir. 1976); *State of Missouri ex rel. Ashcroft v. Dep't of the Army*, 672 F.2d 1297, 1304 (8th Cir. 1982). Only when a pollutant is added by the dam itself is a permit required. *Consumers Power Co.*, 862 F.2d 580; *United States ex rel. TVA v. Tenn. Water Quality Control Board*, 717 F.2d 992 (6th Cir. 1983), *cert. denied, 446 U.S. 937 (1984); Gorsuch*, 693 F.2d 156. Defendants assert that Mine Run Dam adds nothing to the navigable waters which it impounds because it deliberately was constructed of non-reactive materials.

Defendants cannot rely on cases which involve storage or hydroelectric dams that temporarily impound the flow of navigable waters. Mine Run Dam and Reservoir impound mostly leachate rather than navigable waters, and although some of the impounded waters are navigable, additional pollutants are added to the leachate contained in the Mine Run Dam Reservoir by channeling polluted runoff. *See West Virginia Coal v. Reilly*, 728 F. Supp. 1276, 1283 (S.D. W.Va. 1989) (impoundment of " 'waters of the United States' does not effect regulatory

responsibility of EPA under the Clean Water Act). Moreover, the fact that Mine Run Dam is a dam that impounds some navigable waters does not relieve defendants from the permit requirement of the Clean Water Act. Permits have been issued for dams where their purpose is to treat municipal wastes which are then discharged into navigable waters. *See Consumers Power*, 862 F.2d at 586; *see also Gorsuch*, 693 F.2d at 165 n.22 ("a dam can, in some circumstances, be a 'point source' "). Defendants' position would, in effect, allow defendants to discharge channeled pollutants with impunity. I find no language of the statute to support such a result. *See United States v. Alfeche*, 942 F.2d 697, 698-99 (9th Cir. 1991) (interpretation that is consistent with the language of the statute and avoids absurd results is preferred).[39] Under these circumstances, there appears to be no reasonable doubt that the discharges are from point sources, thus satisfying the last remaining element of plaintiff's cause of action.

V

CONCLUSION

As to both EBMUD and the RWQCB, plaintiff has met its burden of showing that they are liable by virtue of their relationship to Mine Run Dam and Reservoir and

---

[39] Although Congress defined "navigable waters" to give the term the "broadest possible constitutional interpretation," Congress did so to regulate, rather than to exempt, discharges into waters of the United States. *See, e.g., Earth Sciences*, 599 F.2d at 375; *In re Arizona Appetito's Stores, Inc.*, 893 F.2d 216, 219 (9th Cir. 1990) (statutes should be interpreted to advance the purposes of Congress).

their discharge of pollutants through point sources into navigable waters of the United States without a permit as required by the Clean Water Act.[40]

VI

ORDER

For all the above reasons, IT IS HEREBY ORDERED:

(1) Defendants EBMUD and the individual members of the RWQCB's motions to dismiss are DENIED; and

(2) Plaintiff's motion for summary judgment on EBMUD's liability under the Clean Water Act is GRANTED;

(3) Plaintiff's motion for summary judgment on the individual members of the RWQCB's liability under the Clean Water Act is GRANTED.

IT IS SO ORDERED.

---

[40] The drought spawned a battle of the experts as to whether the conditions at the site threatened continued spills into the Camanche Reservoir and Mokelumne River. According to the newspapers, the recent rains have laid that dispute to rest. The court will resist an extended analysis of the state of the record unless within fifteen (15) days of the issuance of this Order either defendant contends that the newspapers' reports of the situation are incorrect. For the same reason, the court sees no reason to further delay disposition of this case to accommodate plaintiff's motion to supplement.

DATED: March 2, 1993.

/s/ Lawrence K. Karlton
LAWRENCE K. KARLTON
CHIEF JUDGE EMERITUS
UNITED STATES
DISTRICT COURT

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

COMMITTEE TO SAVE MOKELUMNE RIVER, a California non-profit corporation, Plaintiff-Appellee, v. EAST BAY MUNICIPAL UTILITY DISTRICT, a California Municipal Utility District, et al., Defendants-Appellants.	No. 93-15999 D.C. No. CIV-S-91-1372-LKK-PAN ORDER (Filed Apr. 21, 1994)

Before: REAVLEY,* PREGERSON, and FERNANDEZ, Circuit Judges.

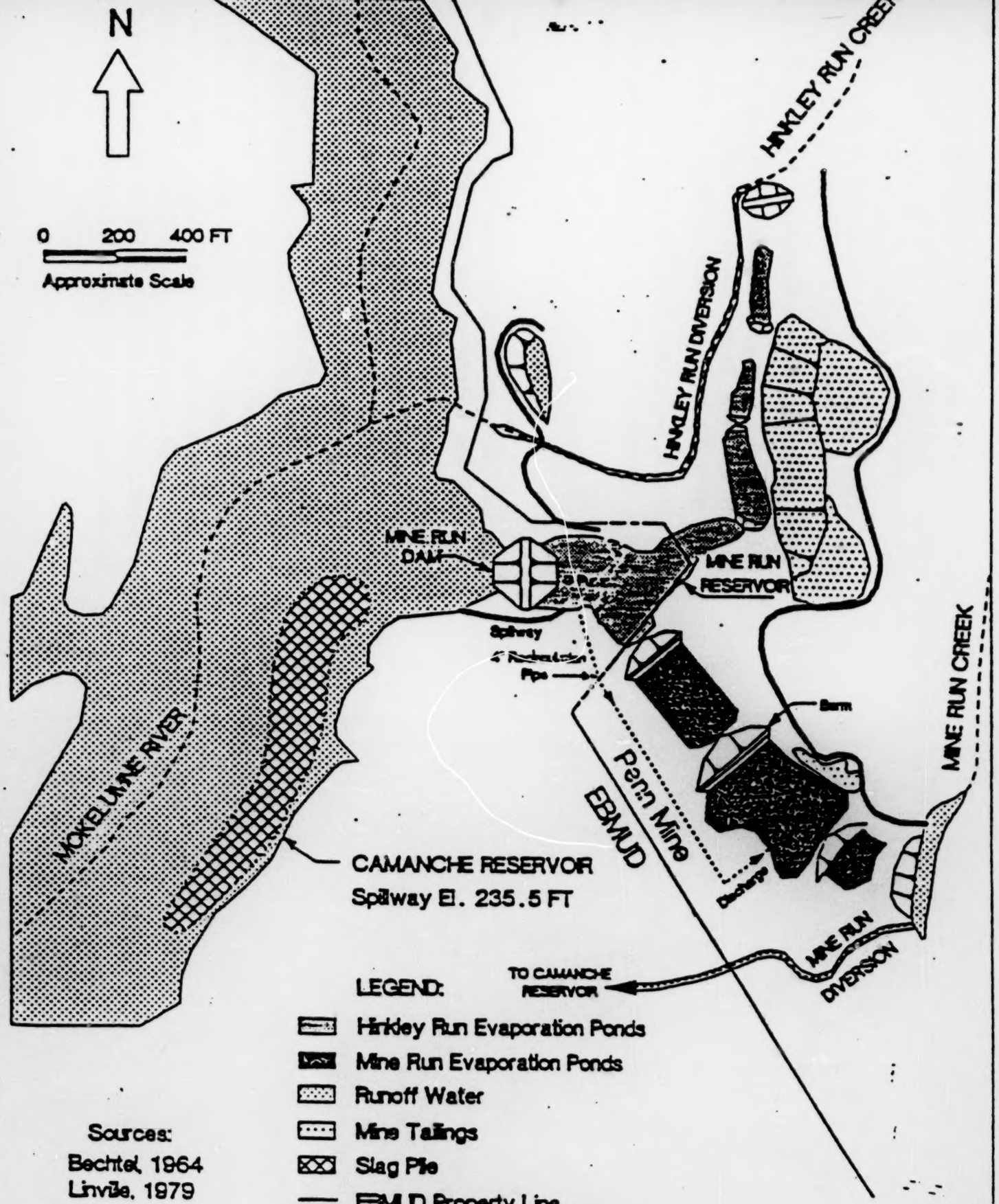
The panel has voted unanimously to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

---

* Hon. Thomas M. Reavley, United States Circuit Judge, U.S. Court of Appeals for the Fifth Circuit, sitting by designation.



Sources:
Bechtel, 1964
Linville, 1979

Figure 2 Penn Mine Site Plan

008563

Exhibit B

UNITED STATES CODE SERVICE
TITLE 33. NAVIGATION AND NAVIGABLE WATERS
CHAPTER 26. WATER POLLUTION
PREVENTION AND CONTROL
RESEARCH AND RELATED PROGRAMS
33 USCS § 1251 (1994)

§ 1251. Congressional declaration of goals and policy

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective.

The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. . . .

* * *

(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States.

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act. It is the policy of Congress that the States manage the construction grant program under this Act and implement the permit programs under sections 402 and 404 of this Act [33 USCS §§ 1342, 1344]. It is further the policy of the Congress to support and aid

research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

* * *

UNITED STATES CODE SERVICE
TITLE 33. NAVIGATION AND NAVIGABLE WATERS
CHAPTER 26. WATER POLLUTION
PREVENTION AND CONTROL
STANDARDS AND ENFORCEMENT
33 USCS § 1311 (1994)

§ 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law. Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act [33 USCS §§ 1312, 1316, 1317, 1328, 1342, 1344], the discharge of any pollutant by any person shall be unlawful.

* * *

UNITED STATES CODE SERVICE

TITLE 33. NAVIGATION AND NAVIGABLE WATERS

CHAPTER 26. WATER POLLUTION PREVENTION AND CONTROL

STANDARDS AND ENFORCEMENT

33 USCS § 1319

§ 1319. Enforcement

(a) State enforcement; compliance orders.

(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 301, 302, 306, 307, 308, 318, or 405 of this Act [33 USCS § 1311, 1312, 1316, 1317, 1318, 1328, or 1345] in a permit issued by a State under an approved permit program under section 402 or 404 of this Act [33 USCS § 1342 or 1344], he shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action in accordance with subsection (b) of this section.

* * *

(3) Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 301, 302, 306, 307, 308, 318, or 405 of this Act [33 USCS § 1311, 1312, 1316, 1317, 1318, 1328, or 1345], or

is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act [33 USCS § 1342] by him or by a State or in a permit issued under section 404 of this Act [33 USCS § 1344] by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

* * *

(b) Civil actions. The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. . . .

(c) Criminal penalties.

(1) Negligent violations. Any person who –

(A) negligently violates section 301, 302, 306, 307, 308, 311(b)(3), 318, or 405 of this Act [33 USCS § 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345], or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 402(a)(3) or 402(b)(8) of this Act [33 USCS § 1342(a)(3) or (b)(8)] or in a permit issued under section 404 of this Act [33 USCS § 1344] by the Secretary of the Army or by a State; . . .

* * *

shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.

* * *

(d) Civil penalties. Any person who violates section 301, 302, 306, 307, 308, 318, or 405 of this Act [33 USCS § 1311, 1312, 1316, 1317, 1318, 1328, or 1345], or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act [33 USCS § 1342] by the Administrator, or by a State, or in a permit issued under section 404 of this Act [33 USCS § 1344] by a State [,], or any requiremer' imposed in a pretreatment program approved under section 402(a)(3) or 402(b)(8) of this Act [33 USCS § 1342(a)(3) or (b)(8)], and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $ 25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

UNITED STATES CODE SERVICE
TITLE 33. NAVIGATION AND NAVIGABLE WATERS
CHAPTER 26. WATER POLLUTION
PREVENTION AND CONTROL
PERMITS AND LICENSES
33 USCS § 1342 (1994)

§ 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants.

(1) Except as provided in sections 318 and 404 of this Act [33 USCS §§ 1328, 1344], the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301(a) [33 USCS § 1311(a)], upon condition that such discharge will meet either (A) all applicable requirements under sections 301, 302, 306, 307, 308, and 403 of this Act [33 USCS §§ 1311, 1312, 1316, 1317, 1318, 1343], (B) or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits

issued thereunder under subsection (b) of this section.

* * *

(b) State permit programs. At any time after the promulgation of the guidelines required by subsection (h)(2) of section 304 [304(i)(2)] of this Act [33 USCS § 1314(i)(2)], the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which –

(A) apply, and insure compliance with, any applicable requirements of sections 301, 302, 306, 307, and 403 [33 USCS §§ 1311, 1312, 1316, 1317, 1343];

* * *

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

* * *

(k) Compliance with permits. Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 309 and 505 [33 USCS §§ 1319, 1365], with sections 301, 302, 306, 307, and 403 [33 USCS §§ 1311, 1312, 1316, 1317, 1343], except any standard imposed under section 307 [33 USCS § 1317] for a toxic pollutant injurious to human health. . . .

* * *

UNITED STATES CODE SERVICE
TITLE 33. NAVIGATION AND NAVIGABLE WATERS
CHAPTER 26. WATER POLLUTION
PREVENTION AND CONTROL
GENERAL PROVISIONS
33 USCS § 1362 (1994)

§ 1362. Definitions

Except as otherwise specifically provided, when used in this Act:

> (1) The term "State water pollution control agency" means the State agency designated by the Governor having responsibility for enforcing State laws relating to the abatement of pollution.
>
> * * *
>
> (3) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana

Islands, and the Trust Territory of the Pacific Islands.

* * *

(5) The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a state, or any interstate body.

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels" within the meaning of section 312 of this Act [33 USCS § 1322]; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

* * *

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition

of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

* * *

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

UNITED STATES CODE SERVICE
TITLE 33. NAVIGATION AND NAVIGABLE WATERS
CHAPTER 26. WATER POLLUTION
PREVENTION AND CONTROL
GENERAL PROVISIONS
33 USCS § 1365 (1994)

§ 1365. Citizen suits

(a) Authorization; jurisdiction. Except as provided in subsection (b) of this section and section 309(g)(6) [33 USCS § 1319(g)(6)], any citizen may commence a civil action on his own behalf –

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution)

who is alleged to be in violation of (A) an effluent standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 309(d) of this Act [33 USCS § 1319(d)].

* * *

UNITED STATES CODE SERVICE
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 103. COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY
HAZARDOUS SUBSTANCES RELEASES, LIABILITY, COMPENSATION
42 USCS § 9601 (1994)

§ 9601. Definitions

For purposes of this title [42 USCS §§ 9601 et seq.] –

* * *

(20) . . .

(D) The term "owner or operator" does not include a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. The exclusion provided under this paragraph shall not apply to any State or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility, and such a State or local government shall be subject to the provisions of this Act in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 107 [42 USCS § 9607].

* * *

UNITED STATES CODE SERVICE
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 103. COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY
HAZARDOUS SUBSTANCES RELEASES, LIABILITY, COMPENSATION
42 USCS § 9607 (1994)

§ 9607. Liability

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date. Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section –

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes

the incurrence of response costs, of a hazardous substance, shall be liable for –

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 104(i) [42 USCS § 9604(i)].

* * *

(d) Rendering care or advice.

(1) In general. Except as provided in paragraph (2), no person shall be liable under this title [42 USCS §§ 9601 et seq.] for costs or damages as a result of actions taken or omitted in the course of rendering care, assistance, or advice in accordance with the National Contingency Plan ("NCP") or at the direction of an onscene coordinator appointed under such plan, with respect to an incident creating a danger to public health or welfare or the environment as a result of any releases of a hazardous substance or the threat thereof. This paragraph

shall not preclude liability for costs or damages as the result of negligence on the part of such person.

(2) State and local governments. No State or local government shall be liable under this title [42 USCS §§ 9601 et seq.] for costs or damages as a result of actions taken in response to an emergency created by the release or threatened release of a hazardous substance generated by or from a facility owned by another person. This paragraph shall not preclude liability for costs or damages as a result of gross negligence or intentional misconduct by the State or local government. For the purpose of the preceding sentence, reckless, willful, or wanton misconduct shall constitute gross negligence.

(3) Savings provision. This subsection shall not alter the liability of any person covered by the provisions of paragraph (1), (2), (3), or (4) of subsection (a) of this section with respect to the release or threatened release concerned.

* * *

TITLE 40 – PROTECTION OF ENVIRONMENT;
REVISED AS OF JULY 1, 1993
CHAPTER I – ENVIRONMENTAL
PROTECTION AGENCY
SUBCHAPTER D – WATER PROGRAMS
PART 122 – EPA ADMINISTERED PERMIT PROGRAMS:
THE NATIONAL POLLUTANT
DISCHARGE ELIMINATION SYSTEM
SUBPART A – DEFINITIONS AND
GENERAL PROGRAM REQUIREMENTS
40 CFR 122.2

§ 122.2 Definitions.

The following definitions apply to parts 122, 123, and 124. Terms not defined in this section have the meaning given by CWA. When a defined term appears in a definition, the defined term is sometimes placed in quotation marks as an aid to readers.

* * *

Discharge when used without qualification means the "discharge of a pollutant."

Discharge of a pollutant means:

(a) Any addition of any "pollutant" or combination of pollutants to "waters of the United States" from any "point source," or

(b) Any addition of any pollutant or combination of pollutants to the waters of the "contiguous zone" or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation.

This definition includes additions of pollutants into waters of the United States from: surface runoff which is

collected or channelled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any "indirect discharger."

* * *

Point source means any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture or agricultural storm water runoff. (See § 122.3).

* * *

DEERING'S CALIFORNIA CODES

WATER CODE
Annotated

OF THE STATE OF CALIFORNIA

Adopted May 13, 1943
with amendments through the December 1993
Session of the 1993-94 Legislature

§ 13000 to § 29999

Annotated and Indexed by
The Publisher's Editorial Staff

§ 13304. Cleanup or abatement order; Enforcement; Prompt or immediate action

(a) Any person who has discharged or discharges waste into the waters of this state in violation of any waste discharge requirement or other order or prohibition issued by a regional board or the state board, or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the regional board, clean up the waste or abate the effects of the waste, or, in the case of threatened pollution or nuisance, take other necessary remedial action, including, but not limited to, overseeing cleanup and abatement efforts. Upon failure of any person to comply with the cleanup or abatement order, the Attorney General, at the request of the board, shall petition the superior court for that county for the issuance of an injunction requiring the person to comply with the order. In any such suit, the court shall have jurisdiction to grant a prohibitory or mandatory injunction,

either preliminary or permanent, as the facts may warrant.

(b) (1) The regional board may expend available money to perform any cleanup, abatement, or remedial work required under the circumstances set forth in subdivision (a), including, but not limited to, supervision of cleanup and abatement activities which, in its judgment, is required by the magnitude of endeavor or urgency of prompt action needed to prevent substantial pollution, nuisance, or injury to any waters of the state. The action may be taken in default of, or in addition to, remedial work by the waste discharger or other persons, and regardless of whether injunctive relief is being sought.

(2) The regional board may perform the work itself, or with the cooperation of any other governmental agency, and may use rented tools or equipment, either with operators furnished or unoperated. Notwithstanding any other provisions of law, the regional board may enter into oral contracts for the work, and the contracts, whether written or oral, may include provisions for equipment rental and in addition the furnishing of labor and materials necessary to accomplish the work. The contracts are exempt from approval by the Department of General Services pursuant to Section 14780 of the Government Code.

(3) The regional board shall be permitted reasonable access to the affected property as necessary to perform any cleanup, abatement, or other remedial work. The access shall be obtained with the consent of the owner or possessor of the property or, if the consent is withheld, with a warrant duly issued pursuant to the procedure described in Title 13 (commencing with Section 1822.50) of Part 3 of the Code of Civil Procedure. However, in the event of an

emergency affecting public health or safety, the regional board may enter the property without consent or the issuance of a warrant.

(c) (1) If the waste is cleaned up or the effects of the waste are abated, or, in the case of threatened pollution or nuisance, other necessary remedial action is taken by any governmental agency, the person or persons who discharged the waste, discharges the waste, or threatened to cause or permit the discharge of the waste within the meaning of subdivision (a), are liable to that governmental agency to the extent of the reasonable costs actually incurred in cleaning up the waste, abating the effects of the waste, supervising cleanup or abatement activities, or taking other remedial action. The amount of the costs is recoverable in a civil action by, and paid to, the governmental agency and the state board to the extent of the latter's contribution to the cleanup costs from the State Water Pollution Cleanup and Abatement Account or other available funds.

(2) The amount of the costs constitutes a lien on the affected property upon service of a copy of the notice of lien on the owner and upon the recordation of a notice of lien, which identifies the property on which the condition was abated, the amount of the lien, and the owner of record of the property, in the office of the county recorder of the county in which the property is located. Upon recordation, the lien has the same force, effect, and priority as a judgment lien, except that it attaches only to the property posted and described in the notice of lien, and shall continue for 10 years from the time of the recording of the notice, unless sooner released or otherwise discharged. Not later than 45 days after receiving a notice of lien, the owner may petition the court for an order releasing the property from the lien or

reducing the amount of the lien. In this court action, the governmental agency that incurred the cleanup costs shall establish that the costs were reasonable and necessary. The lien may be foreclosed by an action brought by the state board, on behalf of the regional board, for a money judgment. Money recovered by a judgment in favor of the state board shall be deposited in the State Water Pollution Cleanup and Abatement Account.

(d) If, despite reasonable effort by the regional board to identify the person responsible for the discharge of waste or the condition of pollution or nuisance, the person is not identified at the time cleanup, abatement, or remedial work is required to be performed, the regional board is not required to issue an order under this section.

(e) "Threaten," for purposes of this section, means a condition creating a substantial probability of harm, when the probability and potential extent of harm make it reasonably necessary to take immediate action to prevent, reduce, or mitigate damages to persons, property, or natural resources.

(f) This section does not impose any new liability for acts occurring before January 1, 1981, if the acts were not in violation of existing laws or regulations at the time they occurred.

(g) Nothing in this section limits the authority of any state agency under any other law or regulation to enforce or administer any cleanup or abatement activity.

§ 13305. Posting notice of pollution or nuisance from "nonoperating" business location and demand for abatement; Notices, hearing, and abatement; Lien for costs, and foreclosure thereof

(a) Upon determining that a condition of pollution or nuisance exists which has resulted from a nonoperating industrial or business location within its region, a regional board may cause notice of the condition to be posted upon the property in question. The notice shall state that the condition constitutes either a condition of pollution or nuisance which is required to be abated by correction of the condition, or it will be corrected by the city, county, other public agency, or regional board at the property owner's expense. The notice shall further state that all property owners having any objections to the proposed correction of the condition may attend a hearing to be held by the regional board at a time not less than 10 days from the posting of the notice.

(b) Notice of the hearing prescribed in this section shall be given in the county where the property is located pursuant to Section 6061 of the Government Code.

(c) In addition to posting and publication, notice as required in this section shall be mailed to the property owners as their names and addresses appear from the last equalized assessment roll.

(d) At the time stated in the notices, the regional board shall hear and consider all objections or protests, if any, to the proposed correction of the condition, and may continue the hearing from time to time.

(e) (1) After final action is taken by the regional board on the disposition of any protests or objections, or if no protests or objections are received, the regional board shall request the city, county, or other public agency in which the conditions of pollution or the nuisance exists to abate those conditions or the nuisance.

(2) If the city, county, or other public agency does not abate the condition within a reasonable time, the

regional board shall cause the condition to be abated. The regional board may proceed by force account, contract or other agreement or any other method deemed most expedient by the regional board, and shall apply to the state board for the necessary funds.

(3) The regional board shall be permitted reasonable access to the affected property as necessary to perform any cleanup, abatement, or other remedial work. Access shall be obtained with the consent of the owner or possessor of the property, or, if the consent is withheld, with a warrant duly issued pursuant to the procedure described in Title 13 (commencing with Section 1822.50) of Part 3 of the Code of Civil Procedure. However, in the event of an emergency affecting public health or safety, the regional board may enter the property without consent or the issuance of a warrant.

(f) The owner of the property on which the condition exists, or is created, is liable for all reasonable costs incurred by the regional board or any city, county, or public agency in abating the condition. The amount of the cost for abating the condition upon the property in question constitutes a lien upon the property so posted upon the recordation of a notice of lien, which identifies the property on which the condition was abated and the amount the lien, and the owner of record of the property, in the office of the county recorder of the county in which the property is located. Upon recordation, the lien has the same force, effect, and priority as a judgment lien, except that it attaches only to the property so posted and described in the notice of lien, and shall continue for 10 years from the time of the recording of the notice unless sooner released or otherwise discharged. The lien may be foreclosed by an action brought by the

city, county, other public agency, or state board, on behalf of the regional board, for a money judgment. Money recovered by a judgment in favor of the state board shall be returned to the State Water Pollution Cleanup and Abatement Account.

(g) The city, county, other public agency, or state board on behalf of a regional board, may, at any time, release all, or any portion, of the property subject to a lien imposed pursuant to subdivision (f) from the lien or subordinate the lien to other liens and encumbrances if it determines that the amount owed is sufficiently secured by a lien on other property or that the release or subordination of the lien will not jeopardize the collection of the amount owed. A certificate by the state board, city, county, or other public agency to the effect that any property has been released from the lien or that the lien has been subordinated to other liens and encumbrances is conclusive evidence that the property has been released or that the lien has been subordinated as provided in the certificate.

(h) As used in this section, the words "nonoperating" or "not in operation" means the business is not conducting routine operations usually associated with that kind of business.

(i) Nothing in this section limits the authority of any state agency under any other law or regulation to enforce or administer any cleanup or abatement activity.

Stats. 1969, ch. 482, § 33, p. 1088

SEC. 33. The Legislature hereby finds and declares that over the years chronic and continuing conditions of pollution and nuisance have resulted from the physical and geographic locations of property once used as industrial or business sites but not [now] in operation. The Legislature further finds and declares that such conditions cannot be effectively dealt with pursuant to other regulatory authority exercised by a California regional water quality control board, since continuing discharges are not usually involved and the industry or businesses are not in operation and since the owners of such property are frequently absent from the board's jurisdiction and cannot be readily be required to abate the condition. The Legislature, therefore, further finds and declares that it is imperative, in order to remedy conditions of pollution and nuisance emanating from nonoperating industrial or business locations, such as mines, that regional water quality control boards be authorized to regulate such conditions in the manner provided in Section 13305 of the Water Code.

State of California
Memorandum

Date: MAR 12 1993

To : All Regional Water Board
Executive Officers

ORIGINAL SIGNED BY
Walt Pettit
Executive Director
OFFICE OF THE CHIEF COUNSEL

From : STATE WATER RESOURCES CONTROL
BOARD
901 P Street, Sacramento, CA 95814
Mail Code: G-8

Subject: CLEANUPS BY REGIONAL WATER BOARDS AND COOPERATING GOVERNMENT AGENCIES

On March 2, 1993 the federal District Court for the Eastern District of California ruled that the Regional Water Quality Control Board, Central Valley Region, was a discharger at an abandoned mine site (Penn Mine) because the Regional Water Board had undertaken pollution abatement work at the mine site. In 1978, the Regional Water Board used its authority under Water Code Sections 13304 and 13305 and constructed impoundments within two creek drainages to capture acid mine drainage (AMD) which had been flowing in the creeks to the Mokelumne River for decades. The Regional Water Board also owns a pump which is used to pump the AMD back up the drainage in order to promote evaporation and prevent spills. Also named as a discharger was the East Bay Municipal Utility District (EBMUD) which had constructed a dam at the confluence of the two

creeks which also captured AMD as part of the same project. While the impoundments reduced the frequency and timing of AMD flows into the Mokelumne River, they were intended only as a partial mitigation and AMD releases from the EBMUD dam have occurred every winter, except the winters of 1987 through 1992.

Because of this federal court ruling, the Regional Water Board may be responsible for meeting the terms of an NPDES permit at the cost of millions of dollars. The Regional Water Board may also face assessment of civil penalties.

Because of this court ruling, I am advising you as Regional Water Boards not to undertake cleanups which have potential for discharge to surface water. You should also advise any other government agencies which propose to participate in such cleanups pursuant to Water Code Sections 13304 and 13305 of their potential liability. This includes projects at both abandoned sites and sites which have identifiable owner/operators because the Regional Water Board could be deemed to be a joint discharger. Undertaking these projects places the taxpayers at risk of millions of dollars of liability for property which the State does not own and for pollution which the State has not caused.

cc: Ms. Carol Browner
Administrator
Environmental Protection Agency
401 M Street, SW
Washington, DC 20460

Mr. John Wise
Acting Regional Administrator
Environmental Protection Agency
Region 9
75 Hawthorne Street
San Francisco, CA 94105

Mr. James M. Strock
Secretary for Environmental Protection
California Environmental
Protection Agency
555 Capitol Mall, Suite 525
Sacramento, CA 95814

Ms. Sara Drake
Deputy Attorney General
Office of the Attorney General
1515 K Street, Suite 511
Sacramento, CA 95814

State Water Board Members
Dale Claypoole

bcc: Jennifer Soloway

JSSoloway/dlheryford (3-11-93)
dhery220/OCC.ATTY/dl.3.11

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, et al., Plaintiffs, vs. NEW PENN MINES, INC., et al., Defendants.	CIVIL NO. S-86-1216 MLS

ORDER
(Filed July 27, 1988)

Plaintiffs, People of the State of California (California Water Quality Control Board) and the State of California ("the State") and East Bay Municipal Utility District ("EBMUD"), have each filed motions for partial summary judgment on the issue of damages. In its April 18, 1988 order, the court granted plaintiffs' earlier motion for summary judgment under section 107(a) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9607(a), on the issue of liability alone. The court also vacated the scheduled final pretrial and trial dates and reopened law and motion to allow plaintiffs the opportunity to bring their present motions regarding the amount of costs recoverable under CERCLA.

Plaintiffs' motions were originally scheduled for hearing on the July 22 motion calendar of this court. However, because of defendants' failure to oppose or to file a statement of non-opposition to plaintiffs' motions as

required by Local Rule 230, the motions were ordered submitted, effective July 18.[1] The court, having considered the plaintiffs' moving papers and attached exhibits, now renders its decision.[2]

In light of defendants' failure to oppose plaintiffs' motions for partial summary judgment, there appear to be no genuine issues of material fact to be tried regarding the amount of costs. Therefore, plaintiffs are requesting recovery of the amount of costs, plus interest,[3] incurred in removing the wastes from the Penn Mine property and in taking remedial action to abate the wastes. Defendants were found to be jointly and severally liable for these costs.[4] *See* April 18, 1988 Order at 4.

CERCLA, 42 U.S.C. § 9607(a)(4)(A), authorizes the State to recover those cleanup and abatement costs which

---

[1] Defendants also failed to oppose the previous motion for summary judgment regarding liability, thereby prompting the court to vacate the scheduled dates and reopen law and motion.

[2] On July 21, defendant Dorothy Fleming, through her attorney, filed an opposition to the State's motion, in spite of defendant's counsel's assurance to the court in a telephone conversation two days earlier that he would not be opposing the motions presently before the court. This late filing is completely unresponsive to the State's motion primarily because it concerns defendant Fleming's *liability* for the State's response costs. The liability issue has already been decided in these proceedings. Therefore, defendant's filing cannot be considered in deciding these motions.

[3] CERCLA expressly provides that "[t]he amounts recoverable in an action under this section shall include interest . . . . " 42 U.S.C.A. § 9607(a) (1988 Supp.).

[4] Defendant John L. Curtis is no longer a party to this action since he is recently deceased.

are consistent with the national contingency plan ("NCP"). Defendants bear the burden of proving that the State's costs are inconsistent with the NCP. *United States v. Northeastern Pharmaceutical & Chemical Co., Inc.*, 810 F.2d 726, 747 (8th Cir. 1986), *cert. denied*, ___ U.S. ___, 108 S. Ct. 146 (1987). Defendants have not attempted to meet or to satisfy that burden. In the absence of contradictory evidence, this court must defer to the judgment of agency professionals on this issue. *Id.* at 748. Accordingly, the court finds that the actions undertaken by the State are consistent with the NCP, and therefore, the costs of those actions are recoverable.

Plaintiff EBMUD may recover its response costs under subsection (a)(4)(B) of section 107, which authorizes recovery of "any other necessary costs of response incurred *by any other person* consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B) (emphasis added). EBMUD may recover these costs even though they were incurred prior to the enactment of CERCLA and prior to the 1982 national contingency plan. *See Northeastern Pharmaceutical*, 810 F.2d at 737; *United States v. Shell Oil Co.*, 605 F. Supp. 1064, 1074 (D. Colo. 1985). Although prior governmental approval of response and remedial actions is not required, *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 892 (9th Cir. 1986), the fact that EBMUD acted pursuant to a state ordered mandate and a cooperative agreement with the State indicates that EBMUD's actions were both cost-effective and environmentally sound. Accordingly, they too are entitled to recover their response costs.

In light of the foregoing, IT IS ORDERED:

1. That defendants pay to the State of California the sum of $200,206 plus interest for response costs; and

2. That defendants pay to the East Bay Municipal Utility District the sum of $343,269.23 plus interest for response costs.

DATED: July 27, 1988.

/s/ Milton L. Schwartz
UNITED STATES
DISTRICT JUDGE

United States District Court
EASTERN DISTRICT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA	**JUDGMENT IN A CIVIL CASE**
V.	(Filed July 27, 1988)
NEW PENN MINES, et al	CASE NUMBER: CV-S-86-1216 MLS

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Plaintifss [sic] motion for summary judgment granted in accordance with order dated July 27, 1988.

Defendants pay State of California the sum of $200,206 plus interest for response costs and to East Bay Municipal Unility [sic] District the sum of $343,269.23 plus interest for response costs.

July 27, 1988
Date

James R. Grindstaff
Clerk

/s/ Eddy J. Emmons
(By) Deputy Clerk

CERTIFICATE OF SERVICE

PEOPLE OF THE STATE OF CA, et al	)	CV-S- 86-1216 MLS
v.	)	
NEW PENN MINES, et al	)	

I, the undersigned, hereby certify that I am an employee in the Office of Clerk, U.S. District Court, Eastern District of California.

That on July 27, 1988, **I served a copy of the attached** Order(s) and Judgment **by placing said copy in a postage paid envelope addressed to the persons listed below, by depositing said envelope in the U.S. Mail at Sacramento, CA; or by placing said copy into an inter-office delivery receptacle located in the Clerk's Office.**

SERVED BY MAIL **SERVED BY INTER-OFFICE**

Ken Alex
6000 State Building
350 McAllister St
San Francisco, CA 94102

Judge Schwartz (3)

Robert B. Maddow
Veronica Y. Fauntleroy
2130 Adeline Street
P.O. Box 24055
Oaklnad [sic], CA 94623

Edison P. McDaniels
1566 North D Street
San Bernardino, CA 92405

/s/ Eddy J. Emmons
Eddy J. Emmons
Deputy Clerk